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Clk. Sup. Ct. U. S.

SUPREME COURT OF THE UNITED STATES.

No. ~~177.~~ 103.

THE CITY OF CINCINNATI, APPELLANT,

vs.

E. D. MORGAN & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

GOVERNMENT PRINTING OFFICE.

Aff'd with Cost.

Feb 13

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1 At a circuit court of the United States for the seventh circuit and southern district of Ohio, begun and held at the court-house, in the city of Cincinnati, on the third Tuesday, being the twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States of America the eighty-seventh. Present, the honorable Noah H. Swayne and the honorable Humphrey H. Leavitt, judges of said court.

Among the proceedings had were the following to wit:

Bill.

E. D. MORGAN & Co.
vs.
THE OHIO & MISSISSIPPI RAILROAD CO. *et al.* } In chancery.

Be it remembered, that heretofore, to wit, on the thirteenth day of January, anno Domini one thousand eight hundred and sixty, came the complainants, by N. C. McLean, their counsel, and filed in the clerk's office of the court aforesaid their certain bill in chancery against the said respondents; which said bill is in the words and figures following to wit:

Circuit court of the United States for the southern district of Ohio, in chancery sitting.

Edwin D. Morgan, George D. Morgan, John T. Terry, and Salon Humphreys, citizens of the State of New York, doing business as partners under the
2 name of E. D. Morgan & Co., bring this their bill against the Ohio & Mississippi Railroad Company, a body corporate, legally constituted and organized by and in conformity to the acts of the general assembly of the State of Ohio, and having its principal office and place of business within the southern district of Ohio; Edward D. Mansfield and George Hoadly, trustees, citizens of the State of Ohio, and residents of the southern district thereof; Marshall O. Roberts, John J. Phely, and Henry Alevit, trustees; Edwin Burtlett, David Hoadly and G. S. Robbins, trustees, all citizens of the State of Ohio; the city of Cincinnati, a body corporate, under and by virtue of the laws of the State of Ohio, and having its place of business in the southern district of Ohio; Jethro Mitchel, Richard M. Keys, Samuel Wann, and Hugh McBirney, partners under the name of Wann & McBirney, all citizens of the State of Ohio. And thereupon your orators complain and say, that the Ohio & Mississippi Railroad Company, being a body corporate, created as aforesaid, created and authorized by the laws of the States of Ohio and Indiana to build and construct a railroad from the city of Vincennes, in the State of Indiana, to the city of Cincinnati, in the State of Ohio, did, on the first day of December, 1853, by virtue of the power upon it conferred, make and execute to John McLean and Edward D. Mansfield a
3 mortgage or deed of trust, but the said John McLean declining to act as said trustee, thereupon the said George Hoadly was substituted in his place by the said defendant, the Ohio and Mississippi Railroad Company, according to the provisions of its charter in such case made and provided, and the said deed of trust or mortgage, among other things, recites that whereas the said railroad company is constructing a railroad in pursuance of the powers conferred by the act of incorporation, and have placed the entire line under contract, and have a large amount of the same nearly completed, and are desirous of raising money to be appropriated with other funds of the company in the further construction of said road, its appendages, and the furnishing the necessary engines on and other outfit for the same by the sale of their bonds, which they are expressly authorized by acts of incorporation to do; and

to that end the company have, by a resolution entered of record on their minutes, authorized and directed fifteen hundred bonds to be duly issued, bearing interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York in each year, the principal of said bonds being made payable on the first day of October, 1880, which bonds are severally and respectively of the amount of one thousand dollars.

And the said mortgage further recites, that the said company have authorized and directed that the payment of the said bonds and interest shall be
4 secured to the holders thereof by a second mortgage of all and singular the railroad constructed, or to be constructed, together with all other property, rights, privileges, and effects of the company, as thereinafter set forth by way of mortgage. The said defendant, the *the* Ohio and Mississippi Railroad Company, then by said mortgage grant, sell, transfer, assign and set over to the said defendants, trustees, and the survivors of them, and their or his successors in the trust, all and singular the railroad constructed and to be constructed by the said company, together with all the track, rails, bridges, and fixtures, and the lands upon which the same are situated, and all the privileges, franchises and rights whatsoever of the said company, and all the tolls, income, issues and profits thereof, and all the depots and stations and the real estate upon which they are situated, and all the locomotives, tenders, cars, and all machinery which are now owned, or hereafter may be owned, or in any way may belong to said company, and all which may now or hereafter appertain or belong to said road or any part thereof.

Said mortgage or deed of trust further provided that if default be made in the payment of either principal or interest of said bonds, or any of them, that then and from thenceforth it shall and may be lawful for the grantees
5 thereof, the said trustees, upon the request in writing of any one or more of the holders of said bonds on which interest and principal is not duly paid as aforesaid, to enter into and upon and take possession of all and singular the premises, including the before-mentioned personal property hereby granted, or intended so to be, and by themselves, their agents, take and receive the income and profits of said railroad and mortgaged premises for the purposes of the security hereinbefore declared, first defraying out of the same the expenses of the road and its needful repairs, and the compensation of the officers and agents of said company then due and unpaid; and to sell and dispose of the same, and all benefit and equity of redemption of the said defendant, the Ohio and Mississippi Railroad Company therein, at public auction, giving at least three months' notice of the time, place, and terms of sale, by advertising the same in one or more newspapers, one of which shall be a paper published and of general circulation in the city of Cincinnati; and, as the attorney of the said company, to make and deliver to the purchaser or purchasers thereof good and sufficient deeds of conveyance and of assignment of the same in fee simple, and out of the money arising from such sale to retain and apply so much as will discharge the principal and interest which shall be then due on all of the said bonds issued as aforesaid, with the costs and charges of the same, retain-
6 ing the surplus thereof to be appropriated for the payment of the principal and interest of all the bonds as they shall become due, rendering the overplus of the purchase-money, after the payment of all said bonds, unto the said company or their assigns, which sale shall be a perpetual bar against said company, and all persons claiming by, from, or under them: provided, however, that upon payment of the amount due upon each of said bonds previous to the day of sale, together with the the costs, if any, which shall have accrued on said bonds, or any of them, then the proceedings under said power of sale shall be stayed, and the said company restored to all it had lost, and the rights of all the parties shall stand thereafter as if no default had been made.

And the said company further covenanted in said mortgage or deed of trust

to make, execute, and deliver all such further assurances and instruments of conveyance or assignment as shall from time to time be necessary, and which the said trustees may desire for the better carrying into effect the purposes of the said instrument, and of making the lien, thereby intended to be created, more effectual, and to embrace the said road and its appendages, as and to be constructed and made, and the property and effects thereafter acquired by said company, and intended to be mortgaged.

And it was further agreed in said mortgage or deed of trust, that in case of the death or incapacity of any one or more of said trustees to act in the
7 matter of said trust, the said company and the surviving trustee or trustees shall select a new trustee or trustees, to supply the vacancy thereby created, and shall therefor make, execute and deliver all and singular such further instruments and assurances as may be requisite to enable the trustee or trustees thus designated to execute with the others the purposes of said trust, and so on from time to time.

Your orators further say, that there are contained in said mortgage or deed of trust several other covenants on the part of said company which they are advised are not material to be set forth in this bill for the purposes of this case; all of which, as well as the said covenants and parts of said mortgage or deed of trust hereinbefore stated and set forth, will appear more fully and at large on reference to said mortgage or deed of trust, a copy whereof, marked Exhibit A, is hereto attached and made part hereof.

Your orators further say, that said mortgage or deed of trust was duly executed, in proper legal form, by the said defendant, the *the* Ohio and Mississippi Railroad Company, and was thereafter duly recorded in each of the counties in the States of Ohio and Indiana, in which the property so conveyed in trust thereby, as aforesaid, was situated and hath been employed.

Your orators further say, that said company afterwards negotiated all or a large portion of said bonds mentioned in and secured by said mortgage
8 or deed of trust, and that all of said bonds that are now outstanding are valid claims against said company; but your orators cannot state with exactness how many of said bonds are still outstanding, as they are informed that a large amount thereof have been taken up and cancelled by the said company, so as to leave, as your orators are informed, only somewhere about the number of two hundred and eighty-five still existing as just and valid claims against said company, and entitled to all the security set forth in said mortgage or deed of trust.

Your orators further say, that they are the holders and owners of seventy-two of the said bonds, and entitled to all the benefits and securities set forth in said mortgage or deed of trust, and that upon a portion of said bonds the instalment of interest which became due and payable according to the tenor and effect of said bonds, and the coupons or interest warrants thereto attached, on the first day of October, eighteen hundred and fifty-five, were unpaid by said company, although payment thereof was duly demanded according to the terms thereof.

Your orators further say, that on the first day of April, 1856, one instalment of interest became due and payable on all of said bonds according to the tenor and effect thereof; and that on the first day of October, 1856, another instalment of interest became due and payable in like manner; and that on
9 the first day of April, 1857, another instalment of interest became due and payable in like manner; and that on the first day of October, 1857, another instalment of interest became due and payable in like manner; and that on the first day of April, 1858, another instalment of interest became due and payable in like manner; and that on the first day of October, 1858, another instalment of interest became due and payable in like manner; and that on the first day of April, 1859, another instalment of interest became due and payable in like manner; and that on the first day of October, 1859, another instalment

of interest became due and payable in like manner; but that the said company wholly failed to pay the same, or either of said instalments of interest, though duly demanded at maturity according to the tenor and effect of said bonds, and the same and every part thereof remains due and unpaid and owing by the said company to your orators.

Your orators further say, that the said defendant, the *the* Ohio and Mississippi Railroad Company, is hopelessly insolvent, and that owing to its insolvency and embarrassed condition, its want of credit, and its destitution of means for the prosecution of its business, it is wholly impossible for the said defendants, Edward D. Mansfield and George Hoadly, trustees, in the execution of their said trust, to take possession of the road of said company, and to
10 operate and carry on the same, and that for the same reasons it has become and is impracticable for the said company by its officers and agents to prosecute and carry on its business and operate its road until a sale thereof can be effected, (if such a course were practicable, which your orators charge is not) by the said trustees, in conformity with provisions of said mortgage or deed of trust.

Your orators further say, that in consequence of the insolvency and embarrassments of said company, and its inability to meet its engagements, numerous suits have been and are now being prosecuted against it, by its floating debt and other creditors, and its supplies of wood, and other property, rolling stock and effects, necessary to the operation of said road, and which are covered by the said mortgage or deed of trust, and properly belonging to the said trustees for the purposes of said trust, are in danger of and threatened with seizure under executions issued or to be issued in said suits, and that such seizure would destroy the usefulness of said road, and put your orators and the said trustees to great expense to reclaim said property by suit.

Your orators further say, that for these causes it will be and is entirely impracticable for the said company to operate its road and prosecute its business, and that any suspension and discontinuance thereof would operate irremediable loss and injury to your orators and those who, like them, are the holders and owners of any of said bonds secured by said mortgage or deed of trust,
11 and that the said loss can only be relieved against by the timely aid and equitable interference of your honorable court, as hereinafter prayed to be done. Your orators further say, that they are informed that Marshall O. Roberts, John J. Phely and Henry H. Coit are trustees in a certain mortgage or deed of trust, prior in date to the said mortgage or deed of trust hereinbefore set forth, made and executed by the said defendant, the *the* Ohio and Mississippi Railroad Company, for the purpose of securing the payment of a large amount of bonds, commonly called first mortgage bonds; that said bonds are held, as your orators are informed, by so large a number of individuals that it would be impossible to make them all parties defendants hereto; and your orators therefore pray that the said trustees of said so-called first mortgage may represent and answer for their cestui que trusts, and set forth fully all and singular their rights in and to any or all of said property so mortgaged to secure the bonds held and owned by your orators, as hereinbefore set forth.

Your orators further say, they are informed that Edwin Bartlett, David Hoadly and G. S. Robbins are trustees of a third issue of bonds by said company, called construction bonds, subsequent in date to those of your orators, and which are secured by a subsequent mortgage or deed of trust upon a
12 portion of the whole of the same property, and that said bonds are held by so many different individuals that it would be impossible to make them all parties defendants to this bill; and your orators therefore pray that the said trustees of said construction bonds may answer and represent fully all and singular the rights of these their cestui que trusts in the premises.

Your orators further say, that they are informed that Edwin Bartlett, David

Hoadly and G. S. Robbins are trustees of a fourth issue of bonds by said company, called income bonds, the holders whereof claim some interest in the property so as aforesaid mortgaged to secure the bonds held and owned by your orators, and that the holders of said income bonds are so numerous that they cannot all be made parties hereto; and your orators therefore pray that the said trustees may answer for and represent all and singular the rights of their cestui que trusts in the premises.

Your orators further say, that the city of Cincinnati, Jethro Mitchel, Richard W. Keys, and Samuel Wann and Hugh McBirney claim some lien upon said railroad company and its property, of the exact nature of which your orators are not fully informed, but your orators pray that the said parties may
13 answer and fully set forth all and singular their rights in the premises.

And your orators further say, that the officers and directors of the said defendant, the *the* Ohio and Mississippi Railroad Company, though well knowing that the claims of your orators and other bond-holders under said mortgage or deed of trust are entitled to a priority over all other claims, excepting perhaps it may be the bond-holders under said so-called first mortgage or deed of trust hereinbefore referred to, as to which your orators are not fully advised, yet in fraud of their rights in the premises are misapplying the earnings of said road by appropriating the same to their own purposes and refusing to pay the prior lien held by your orators, which is contrary to equity and in fraud of their rights.

Your orators further say, that for the reasons hereinbefore set forth, consequent upon the insolvent and embarrassed condition of said company financially, and of the efforts of its floating debt creditors to subject the property conveyed as aforesaid to the said trustees for the security of the bonds held and owned by your orators to the payment of their debts and claims, it has become necessary, in order to execute the trust and to preserve the said property to the uses thereof, that the said trustees, Edward D. Mansfield and George Hoadly, take the actual possession and custody thereof; but
14 your orators say that the same causes and circumstances producing said necessity also render it inexpedient, without the aid of this honorable court, so to take possession thereof, and especially because they say that without such aid the said trustees would not have the ability to operate said road, and for that purpose to hold and protect said property against the efforts of said floating debt and other creditors of said company, and otherwise save the same from becoming ruinous and from being lost.

Your orators further say, that by reason of the default made by said company in the non-payment of the interest due on said bonds of your orators, as hereinbefore stated, it has become and is the duty of the said defendant's trustees, Edward D. Mansfield and George Hoadly, to sell and dispose of all of said property, rights, credits, franchises, privileges and effects so conveyed to and vested in them as aforesaid, or to cause the same to be sold and disposed of, and the proceeds thereof to apply in liquidation and payment of the said bonds and interest thereon of said company owned by your orators; but they are advised and charge that they are without any remedy, except by the aid of your honorable court in chancery sitting, so to dispose of said property and assets as that the purchaser thereof may hold the same discharged of all right of redemption on the part of said defendants, if any of them are vested
15 with any valid claim thereto.

Your orators further say, that they bring this bill not only for their own benefit, but for that of all other holders of bonds under the same mortgage or deed of trust who may be willing to come in and contribute to the costs and expenses necessary hereto. In consideration of all which premises your orators pray process of subpœna against the defendants, the *the* Ohio and Mississippi Railroad Company, Edward D. Mansfield and George Hoadly,

trustees; Marshall O. Roberts, John J. Phely and Henry A. Coit, trustees; Edwin Bartlett, David Hoadly and G. S. Robbins, trustees; the city of Cincinnati, Jethro Mitchell, Richard W. Keys, Samuel Wann and Hugh McBirney, and that the said defendants may be compelled and required to answer all and singular the matters and things herein set forth as fully and completely as if they were severally interrogated thereto. And until the final hearing of this cause may be had, and the said property, rights, credits, franchises and effects so conveyed as aforesaid to the said trustees may be sold and disposed of, and to the end that the same may in the mean time be preserved and taken care of, and the railroad of said company operated, and the business of said company prosecuted to the greatest advantage for the benefit of all parties interested therein, your orators pray your honorable court to appoint a suitable
16 receiver or receivers with such powers as shall be adequate for the purposes aforesaid; and on the further hearing herein, your orators pray your honors to make such interlocutory and final orders and decrees as may be necessary to keep and sustain said railroad and its appurtenances in proper repair, order, and condition for use, and to have the same used, operated and carried on until it can be sold and disposed of; and in the mean time the income and product thereof accumulated, or paid, appropriated and applied as may be lawful, and to ascertain, fix and determine what amount is due and owing by said company for principal and interest on its bonds, and each class thereof, made, issued and negotiated by said company, and secured by its various mortgages or deeds of trust, and to declare and determine the priorities of lien between them and all the creditors of said company; and to the end that the same be applied accordingly, to order, adjudge and decree that said railroad and its appurtenances, rolling stock, and property of every description necessary to the operating and use of said road, with the franchises and privileges of said company, rights, credits and effects, and all and whatsoever was and is by the said mortgage or deed of trust conveyed to or vested in the said trustees for the security of the bonds held and owned by your orators, as aforesaid, to be sold and converted into money, and the same be dis-
17 tributed to and among the holders of the various classes of bonds issued as aforesaid by said company according to their respective rights, and as shall be found to be proper in a due and faithful execution of the trust in said mortgages or deeds of trust, and for these purposes to cause to be made, taken and stated, all necessary accounts, and on the final hearing to grant to your orators such other and further relief as may be equitable in the premises.

N. C. McLEAN,
Solicitor for Complainants.

Exhibit A.

Exhibit A, referred to in the foregoing bill, and made a part thereof, is in the words and figures following, to wit:

This indenture, made on the first day of December, 1853, between the Ohio and Mississippi Railroad Company, of the first part, and John McLean and Edward D. Mansfield, of the second part, witnesseth: Whereas the Ohio and Mississippi R. R. Co. are constructing a railroad in pursuance of the powers conferred by the act of incorporation, and have placed the entire line under contract, and have a large amount of the same nearly completed, and are desirous of raising money to be appropriated with other funds of the company in the further construction of said road, its appendages, and the furnishing the necessary engines, cars, and other outfit for the same, by the sale of their bonds, which they are expressly authorized by the acts of incorporation to do; and to that end, the company have, by a resolu-
tion entered of record on their minutes, authorized and directed fifteen hun-
18 dred bonds to be duly issued, bearing interest at the rate of seven per

cent. per annum, payable semi-annually in the city of New York in each year, the principal of said bonds being made payable on the first day of October, 1880; which bonds are severally and respectively of the amount of one thousand dollars, and are of the form following, that is to say:

No. $1,000.

The Ohio and Mississippi Railroad Company.—Vignette.—Cincinnati and St. Louis.

Know all men by these presents, that the Ohio and Mississippi Railroad Company acknowledge themselves indebted to Edward D. Mansfield, or bearer, in the city of New York, on the first day of October, 1880, with interest thereon at the rate of seven per cent. per annum, payable semi-annually at the Bank of America, in the city of New York, on the first days of October and April in each year, on presentation and delivery of the annexed dividend warrants. This bond is one of fifteen hundred of like tenor and date, and the holder is entitled to the security to be derived from a mortgage, bearing even date herewith, on the said road and all the property of the company, executed and delivered to John McLean and Edward D. Mansfield, in trust, to secure the payment of the principal and interest on said bonds. This mortgage is subject to a prior mortgage on said property to secure the sum of two millions
19 and fifty thousand dollars, payable on the first day of July, 1872.

In witness whereof, the said company have caused this bond to be attested in their behalf by their president and secretary, and their common seal affixed, at their office in the city of Cincinnati, this 1st day of December, 1853.

[SEAL.]

——— ———, *President.*

——— ———, *Secretary.*

Fifty-four coupons, of $35 each, attached.

And the said company have authorized and directed that the payment of the said bonds and interest shall be secured to the holders thereof by a second mortgage of all and singular the railroad constructed and to be constructed, together with all the other property, rights, privileges and effects of the company, as hereinafter set forth, by way of mortgage, so as to give the holders of said bonds a lien upon all of said property.

Now, therefore, this indenture witnesseth that the Ohio and Mississippi Railroad Company, the better to secure the payment of said bonds, with interest, and in consideration of one dollar, by the parties of the second part in hand paid, the receipt of which is hereby acknowledged, have granted, sold, transferred, assigned and set over, and by these presents do grant, sell, transfer, assign and set over to the said party of the second part, and the survivor
20 of them, and their or his successors in the trust, all and singular the railroad constructed and to be constructed by the said company, together with all the tracks, rails, bridges, fixtures, and the lands upon which the same are situated, and all the privileges, franchises and rights whatsoever of the said company, and all the tolls, income, issues and profits thereof, and all the depots and stations, and the real estate upon which they are situated, and all the locomotives, tenders, cars, and all machinery which are now owned or hereafter may be owned, or in any way belong to said company, and all which may now or hereafter appertain or belong to said road or any part thereof.

To have and to hold the said property, rights, privileges and effects herein granted and assigned to the said parties of the second part, and the survivors of them, and their and his successor in trust, for the person or persons, corporation or corporations, who shall and may become holders of said bonds, or any of them, subject to the terms of said bonds, according to their tenor and effect,

and subject to the exclusive possession and management of the directors, their officers and agents, so long as the said bonds shall remain unforfeited, and the company shall perform the stipulations of said bonds and of this indenture.

And the party of the first part covenant to make, execute and deliver all such further assurances and instruments of conveyance or assignments
21 as shall from time to time be necessary, and which the parties of the second part may desire, for the better carrying into effect the purposes of these presents, and of making the lien hereby intended to be created more effectual, and to embrace the said road and its appendages, as hereafter constructed and made, and the property and effects hereafter acquired by said company and intended to be mortgaged as shall be hereafter required. And it is further agreed, that any one or more persons, corporation or corporations, may at any time hereafter, on the first day of April or October, have any one or more of the said bonds owned by him, them, or it, converted into the capital stock of said company by the surrender of the bond or bonds sought to be converted for cancellation; and that upon such surrender and cancellation, the said company shall furnish certificates of the capital stock of said company to the amount of one thousand dollars for each and every bond so surrendered.

And it is further provided, that if default be made in the payment of either principal or interest of said bonds, or any of them, that then and from thenceforth it shall and may be lawful for the parties of the second part, upon the request, in writing, of any one or more of the holders of said bonds, on which interest and principal is not duly paid as aforesaid, to enter into and upon, and take possession of all and singular the premises, including the before-mentioned personal property hereby granted, or intended so to be, and by them-
22 selves, their agents, take and receive the income and profits of said railroad and mortgaged premises for the purposes of the security hereinbefore declared, first defraying out of the same the expenses of the road and its needful repairs, and the compensation of the officers and agents of said company *then* due and unpaid, and to sell and dispose of the same, and all benefit and equity of redemption of the parties of the first part therein, at public auction, giving at least three months' notice of the time, place, and terms of sale, by advertising the same in one or more newspapers, one of which shall be a paper published and of general circulation in the city of Cincinnati; and as the attorney of the party of the first part, for that purpose by these presents duly constituted, to make and deliver to the purchaser or purchasers thereof good and sufficient deeds of conveyance, and of assignments of the same, in fee simple, and out of the moneys arising from such sale to retain and apply so much as will discharge the principal and interest which shall be then due on all of the said bonds issued as aforesaid, together with the costs and charges of the sale, retaining the surplus thereof to be appropriated for the payment of the principal and interest of all the bonds as they shall become due, rendering the overplus of the purchase-money, after the payment of all of said bonds,
23 unto the party of the first part, or their assigns, which sale shall be a perpetual bar against the parties of the first part, and all persons claiming by, from, or under them: provided always, and this indenture is made upon this express agreement, that upon payment of the amount due upon each of said bonds previous to the day of sale, together with the costs, if any, which shall have accrued on said bonds, or any of them, then the proceedings of the party of the second part, under this power of sale, shall be stayed, and the party of the first part restored to all they have lost, and this deed and the right of all the parties shall stand thereafter as if though no default had been made: and provided, further, that upon payment or other satisfaction of the principal and interest of each and every of said bonds previous to said sale above provided, with all costs, if any, which shall have accrued on said bonds or any of them, the estate hereby granted to the said trustees, parties of the

second part, shall cease and be void, and the estate hereby granted, and that granted by any other assurance to the said trustees, shall immediately be reinstated in law and in fact in the Ohio and Mississippi Railroad Company without any entry or other act upon their part; and said company shall henceforth have and hold all the rights, privileges and property hereby mortgaged and assigned as though this indenture had not been made.

24 And it is hereby further agreed, that in case of the death or incapacity of any one or more of said trustees to act in the matter of said trust, the said company and the surviving trustee or trustees shall select a new trustee or trustees to supply the vacancy thereby created, and shall therefore make, execute and deliver all and singular such further instruments and assurances as may be requisite to enable the trustee or trustees, thus designated, to execute with the others the purposes of said trust, and so on from time to time.

In witness whereof, the said the Ohio and Mississippi Railroad Company [SEAL.] have caused this instrument to be attested in their behalf by the president and secretary, and their common seal affixed, at their office in the city of Cincinnati, this first day of December, A. D. 1853.

THE OHIO AND MISSISSIPPI RAILROAD CO.,
By JAMES C. HALL, *President.*

Attest:
H. H. GOODMAN, *Sec.*

Signed, sealed and delivered in the presence—
SAM'L R. BATES.
T. J. WEAVER.

THE STATE OF OHIO,
Hamilton county, ss:

Before the undersigned, a notary public in and for said county, duly commissioned and sworn, appeared the Ohio and Miss. R. R. Co., by James
25 C. Hall, esq., pres. of said company, and H. H. Goodman, esq., sec'y, and acknowledged the signing and sealing of the foregoing deed of trust and mortgage to be the act and deed of the said the Ohio and Miss. Railroad Company, for the uses and purposes therein expressed.

Witness my signature and my notarial seal at my office in Cincinnati, this first day of December, 1853.

T. J. WEAVER, *Notary Public.*

Recorded 1st Dec'r, 1853, at 11¾ o'clock a. m.; recorded in book 194, p. 426, Ham. Co, Ohio.

Subpœna.

And thereupon the following subpœnas were issued, to wit:

UNITED STATES OF AMERICA,
Southern district of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon the Ohio and Mississippi Railroad Company, Edward D. Mansfield and George Hoadley, trustees, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in February next, to answer a certain bill in chancery, filed and exhibited in said court against them by Edward D. Morgan, George D. Morgan, John T. Terry, and Solon Humphreys, partners as E. D. Morgan & Co., who are citizens of and residents in the State of

26 New York. Hereof you are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the honorable Roger B. Taney, Chief Justice of the United
[SEAL.] States, this 13th day of January, A. D. 1860, and in the 84th year of the independence of the United States of America.

Attest: JOHN McLEAN, JR., *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court, on or before the first Monday of February, 1860, otherwise the said bill may be taken pro confesso.

JNO. McLEAN, JR., *Clerk.*

And afterwards, to wit, on the third day of February, in the year of our Lord one thousand eight hundred and sixty, came the marshal to whom said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with the following return endorsed thereon, to wit: Served George Hoadley personally by copy, January 13th, 1860; Served E. Flint, vice president Ohio and Mississippi Railroad Company, January 17th 1860, personally by copy; served Edward D. Mansfield, personally by copy, Feb. 3, 1860.

LEWIS W. SIFFORD,
U. S. Marshal.

Subpœna.

And on the 13th day of January, A. D. 1860, the following subpœna was issued:

UNITED STATES OF AMERICA,
Southern district of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Edwin Bartlett, David Hoadley,
27 and David Leavitt, trustees, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in February next, to answer a certain bill in chancery, filed and exhibited in said court against them by Edwin D. Morgan, George D. Morgan, John T. Terry, and Solon Humphreys, partners as E. D. Morgan & Co., who are citizens of and residents in the State of New York. Hereof you are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the honorable Roger B. Taney, Chief Justice of the United
[SEAL.] States, this 13th day of January, A. D. 1860, and in the 84th year of the independence of the United States of America.

Attest: JNO. McLEAN, JR., *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court, on or before the first Monday of February, 1860, otherwise the said bill may be taken pro confesso.

JNO. McLEAN, JR., *Clerk.*

And afterwards, to wit, on the 4th day of February, in the year of our Lord one thousand eight hundred and sixty, came the marshal to whom said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with the following return endorsed thereon, to wit: Feb-

28 ruary 4th, 1860, served each of the within-named, except David Leavitt, who was not found, by copies sent them to New York city, as appears by the following acknowledgment:

We acknowledge service of this upon us personally, by copies to us respectively this 4th day of February, A. D. 1860.

EDWIN BARTLETT,
By COFFIN & MITCHELL,
Attorneys.

LEWIS W. SIFFORD,
U. S. Marshal.

And on the 13th day of January, A. D. 1860, the following subpœna was also issued:

UNITED STATES OF AMERICA,
Southern district of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon John J. Phelps and Henry A. Coit, trustees, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in February next, to answer a certain bill in chancery, filed and exhibited in said court against them by Edwin D. Morgan, George D. Morgan, John T. Terry, and Solon Humphreys, partners in business as E. D. Morgan & Co., who are citizens of and residents in the State of New York. Hereof you are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

[SEAL.] Witness the honorable Roger B. Taney, Chief Justice of the United States, this 13th day of January, A. D. 1860, and in the 84th year
29 of the independence of the United States of America.

Attest: JNO. McLEAN, JR., *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of February, 1860, otherwise the said bill may be taken pro confesso.

JNO. McLEAN, JR., *Clerk.*

And afterwards, to wit, on the 4th day of February, in the year of our Lord 1860, came the marshal to whom said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with the following return endorsed thereon, to wit: February 4th, 1860, I served each of the within-named by copies sent them to New York city, as appears by the following acknowledgment:

We acknowledge service of this writ upon us personally by copies to us respectively, this 4th day of February, A. D. 1860.

JOHN J. PHELPS,
By COFFIN & MITCHELL, *Att'ys.*
HENRY A. COIT,
By COFFIN & MITCHELL, *Att'ys.*

LEWIS W. SIFFORD,
U. S. Marshal.

Afterwards, to wit, on the second day of March, A. D. 1860, it being of the February special and adjourned term of the court last aforesaid, for the year last

aforesaid, this cause came on for hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

Entry.

E. D. Morgan & Co.
vs.
The Ohio & Mississippi R. R. Co. *et al.* } Chancery.

On motion of counsel, leave is hereby granted to the complainants to
30 amend their bill filed in this cause, and make new parties defendants, by striking out the name of David Leavitt, (as to whom this bill is dismissed,) and inserting in the place thereof, wherever it occurs, the name of G. S. Robbins; and leave is given further to amend by inserting in the appropriate and necessary place in said bill, the names of the city of Cincinnati, Jethro Mitchell, Richard M. Keys, Samuel Wann, and Hugh McBirney, partners under the name of Wann & McBirney, with such necessary and appropriate allegations as may be right in the premises.

Precipe.

And afterwards, to wit, on the 6th day of March, A. D. 1860, came the said complainants by N. C. McLean, their solicitor, and filed in the clerk's office of our said court their certain precipe, which precipe is as follows, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. Morgan & Co.
vs.
The Ohio & Mississippi Railroad Co. *et al.*

Issue subpœnas in chancery in the above cause, returnable according to law, against the city of Cincinnati, Jethro Mitchell, jr., Richard M. Keys, and Samuel Wann and Hugh McBirney partners under the name of Wann & McBirney, and G. S. Robbins, trustee.

N. C. McLEAN,
Sol. for complainant

To Clerk of C. C. of U. S., southern district of Ohio. March 6, 1860.

And thereupon our writs of subpœnas issued out of the clerk's office aforesaid, which said writs are in the words and figures following, to wit:

Subpœna.

United States of America,
Southern district of Ohio, ss:

31 The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon the city of Cincinnati, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in April next, to answer a certain bill in chancery, filed and exhibited in said court against it by E. D. Morgan & Co., citizens of and residents in the State of New York. Hereof it is not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the honorable Roger B. Taney, Chief Justice of the United
[SEAL.] States, this 6th day of March, A. D. 1860, and in the 84th year of the independence of the United States of America.

Attest: JNO. McLEAN, Jr., *Clerk.*

Memorandum.

The said defendant is required to enter its appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1860, otherwise the said bill may be taken pro confesso.

JNO. McLEAN, JR., *Clerk.*

Return.

Afterwards, to wit, on the first day of April, A. D. 1860, came the marshal, to whom the foregoing writ was in form aforesaid directed, and returned the same into the clerk's office aforesaid, with his proceedings endorsed thereon, as follows to wit:

On the 29th day of March, 1860, served the city of Cincinnati by delivering to Richard M. Bishop, mayor of said city, a true and certified copy
32 of this writ personally.

LEWIS W. SIFFORD,
U. S. Marshal.
By WM. L. MANSON, *Deputy.*

Subpœna.

UNITED STATES OF AMERICA,
Southern district of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Jethro Mitchell, Richard M. Keys, and Samuel Wann and Hugh McBirney, partners, under the name of Wann & McBirney, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in April next, to answer a certain bill in chancery, filed and exhibited in said court against them by E. D. Morgan & Co., citizens of and residents in the State of New York. Hereof they are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the honorable Roger B. Taney, Chief Justice of the United
[SEAL.] States, this 6th day of March, A. D. 1860, and in the 84th year of the independence of the United States of America.

Attest: JNO. McLEAN, JR., *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1860, otherwise the said bill may be taken pro confesso.

JNO. McLEAN, JR., *Clerk.*

Return.

Afterwards, to wit, on the 1st day of April, A. D. 1860, came the mar-
33 shal to whom the foregoing writ was in form aforesaid directed, and returned the same into the clerk's office aforesaid, with his proceedings thereon endorsed as follows to wit:

Received this writ March 6th, 1860; and on the 7th day of March, 1860, I served the within named Richard M. Keys, personally, by copy; March 14th, 1860, served Jethro Mitchell, personally, by copy; March 16th, 1860, served

Hugh McBirney, personally, by copy; and on the same day Hugh McBirney acknowledged service personally, by copy, for Samuel Wann.

LEWIS W. SIFFORD,
U. S. Marshal.
By R. C. RHONER, *Deputy.*

I acknowledge service personally, by copy, March 16th, 1860.

SAM. WANN,
By HUGH McBIRNEY.

Subpœna.

UNITED STATES OF AMERICA,
Southern district of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon G. S. Robbins, trustee, citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in April next, to answer a certain bill in chancery, filed and exhibited in said court against him by E. D. Morgan & Co., citizens of and residents in the State of New York. Hereof he is not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

[SEAL.] Witness the honorable Roger B. Taney, Chief Justice of the United States, this 6th day of March, A. D. 1860, and in the 84th year of the
34 independence of the United States of America.

Attest: JNO. McLEAN, JR., *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1860, otherwise the said bill may be taken pro confesso.

JNO. McLEAN, JR., *Clerk.*

Afterwards, to wit, on the first day of April, A. D. 1860, came the marshal, to whom the foregoing writ was in form aforesaid directed, and returned the same into the clerk's office aforesaid, with his proceedings endorsed thereon, as follows, to wit:

"Service of this writ personally, by copy, upon E. S. Robbins, is hereby acknowledged."

Cin'ti, March 6, '60.

COFFIN & MITCHELL, *Atty's.*
LEWIS W. SIFFORD,
U. S. Marshal.

Afterwards, to wit, on the 22d day of March, A. D. 1860, it being of the February special and adjourned term of the court aforesaid, for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & COMPANY
vs.
OHIO & MISSISSIPPI R. R. COMPANY. } Chancery.

On motion of N. C. McLean, leave is given to complainants to make Marshall O. Roberts, trustee, a party defendant in this cause, by inserting his name in said

complainant's bill wherever said name belongs, as trustee of the first mortgage therein described; and this cause is continued.

35 Afterwards, to wit, on the 9th day of April, A. D. 1860, there was filed in the office of the clerk of the court aforesaid by Mess. Coffin & Mitchell, solicitors for the respondent, the Ohio and Mississippi R. R. Co., their answer in the premises, which answer is in the words and figures following to wit:

Answer of O. and M. R. R. Co.

In the circuit court of the United States for the southern district of Ohio.

The separate answer of the defendants, the Ohio and Mississippi Railroad Company, to the bill of the complainants, E. D. Morgan & Co.

These defendants, saving to themselves, now and hereafter, the benefit of all exceptions to the said bill, for answer to the same, or to so much thereof as they are advised by counsel that it is necessary for them to answer, say that it is true as alleged in the bill, and they therefore admit, that they, these defendants, executed and delivered the mortgage or deed of trust to John McLean and Edward D. Mansfield in the petition described; and that the said John McLean having declined to act as a trustee thereunder, George Hoadly was duly appointed as a trustee in the stead of the said John McLean; and that of the bonds secured by the said deed of trust there are outstanding and unpaid a considerable number; and that interest, evidenced by coupons or interest warrants attached to the said bonds, is due and unpaid from the first day of April, A. D. 1856.

And these defendants, further answering, say that it is also true, as alleged in the bill, that they executed and delivered to Marshall O. Roberts,

36 Henry A. Coit, and John J. Phelps, a mortgage or deed of trust, similar to that in the bill described, to secure bonds of these defendants; and that the deed of trust to the said Roberts, Coit, and Phelps was prior in point of time, and creates an earlier lien on the property of these defendants to that to the said McLean and Mansfield; and that there are now outstanding of the bonds secured by the deed of trust to the said Phelps, Coit, and Roberts, the amount of two millions and fifty thousand dollars, besides interest thereon.

And these defendants, further answering, say that it is also true that they have executed two other deeds of trust or mortgages similar to the one in the bill described, and subsequent to it in point of time, to Edwin Bartlett, David Hoadley, and George S. Robbins, one of which was designed to secure bonds of these defendants generally called "construction bonds," and the other to secure bonds of these defendants generally called "income bonds," and that the whole bonded debt of these defendants, secured by the said deeds of trust, amounts to the sum of ten millions of dollars, besides accumulated interest thereon already due, and hereafter to accrue.

And these defendants, further answering, say that it is true, and they therefore admit, that in consequence of the misfortunes which attended the construc-

37 tion of their road, and the difficulties which have stood in the way of the development of their resources, they have been hitherto and still are unable to pay the interest upon their said bonded debt as it has accrued, and been accruing; and that, therefore, they cannot deny that they are insolvent as charged in the bill.

And these defendants, further answering, say that it is true as alleged in the bill, and they therefore admit that they owe a considerable amount of floating debt, some of which is represented by judgments against these defendants in various courts of law, and that they, these defendants, are from time to time annoyed by proceedings upon the said judgments; but they further say that such judgments have not been the means of diverting the property or assets of these defendants to any considerable extent.

And these defendants, further answering, say that it is true, and they therefore admit, that they have applied the earnings of their road not only to the payment of necessary operating expenses, but also to the improvement and repair of their roadway, structures, &c.; but they deny that such use of their resources has been improper; and also deny that they have in any other way made a misapplication of their resources.

And these defendants, further answering, say that, besides the different classes of indebtedness already referred to, they have borrowed from individuals considerable sums of money which were absolutely required for the main-
38 tenance and proper operation of their road, and that such loans ought to be, and are designed by these defendants to be, first paid out of the money which can be spared from their earnings after the payment of necessary expenses hereafter to accrue.

And these defendants deny all fraud, and having fully answered, ask to be hence dismissed, with their costs.

COFFIN & MITCHELL,
Sol's for D'f'ts, O. & M. R. R. Co.

Joint answer of Mansfield and Hoadley.

Afterwards, to wit, on the ninth day of April, anno Domini 1860, there was filed in the office of the clerk of the court aforesaid the joint answer of Edward D. Mansfield and George Hoadly, which answer is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

The joint answer of Edward D. Mansfield and George Hoadly to the bill of Edward D. Morgan, George D. Morgan, John T. Terry, and Solon Humphreys, complainants.

Your respondents now come, and, for answer to said bill, say that it is true, as therein alleged, that they are the trustees of the second mortgage given by the said the Ohio and Mississippi Railroad Company, but that they have no other interest in the property mortgaged than as trustees for the holders of the various bonds issued by the said railroad company, and secured by said mortgage; that they are unable to state, of their own knowledge, how many bonds of that issue are still outstanding against said railroad company, but in
39 whatever amount the same may exist your respondents claim from your honors that the interest of their cestui que trusts may be protected.

Your respondents further say that they are informed and believe that large arrearages of interest have become due and remain unpaid to the holders of the said second mortgage bonds, but as to the exact amount of said arrearages your respondents are not informed.

They further say that they believe it to be true, as alleged in said bill, that it would be impossible for your respondents to fully execute their trust by taking possession of the road of the said the Ohio and Mississippi Railroad Company, according to the terms of the said mortgage, and fully to comply with all the provisions thereof in case of default being made by the said company, as is alleged in the said bill of the complainants, without the intervention of this court on its equity side.

In consideration whereof, your respondents submit themselves to the court, and pray your honors to make such orders and decrees in the premises as will fully carry out the true intent and spirit of the trust confided to them, and afford full and ample protection to the all and singular the rights of the cestui que trusts of your respondents as the holders of bonds issued by 2d mortgage aforesaid, given by the said the Ohio and Mississippi Railroad Company to your respondents, George Hoadly, Edward D. Mansfield.

40 Afterwards, to wit, on the 9th day of April, A. D. 1860, there was filed in the office of the clerk of the court aforesaid, by N. C. McLean, counsel for the complainants, their notice of motion for receiver in the premises, which notice is in the words and figures following, to wit:

Notice of motion for receiver.

Circuit court of the United States, southern division of Ohio.

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY *et al.*

The defendants will take notice, that on Monday morning, April 9th, 1860, at ten o'clock, or as soon thereafter as counsel can be heard, the complainants will move for the appointment of a receiver of the railroad of the said the Ohio and Mississippi Railroad Company, before the judges of the circuit court of the United States for the southern district of Ohio, sitting at chambers, in the United States court-house at Cincinnati.

Cin'ti, April 7th, 1860.

N. C. McLEAN,
Counsel for Complainants.

Said notice has the following endorsements thereon, to wit:

Endorsements.

I accept notice for the Ohio and Mississippi Railroad Co.
Ap'l 7, '60.

C. D. COFFIN,
Solicitor for the Company.

We also accept notice for the trustees of the first mortgage bonds, the trustees of the construction mortgage bonds, the trustees of the income mortgage bonds, and for stockholders more than ½ whole amount of stock.
April 7, '60.

COFFIN & MITCHELL.

Afterwards, to wit, on the 9th day of April, anno Domini 1860, this cause came on for further hearing before the court at chambers sitting, and there-
41 upon the following entry was ordered to be made in the premises, which entry is in the words and figures following, to wit:

Entry appointing receiver.

E. D. MORGAN & Co.
vs.
OHIO AND MISS. R. R. Co. *et al.* } Chancery.

On motion of complainants, notice thereof being duly served on the defendants, it is made to appear to the court at chambers sitting, and the court doth find, that it is necessary for the care and preservation of the mortgaged premises sought to be subjected to the payment of the claim of the complainants as set forth in their bill of complaint herein filed, that the said premises be placed in the hands of a receiver, subject to the further order of the court herein. It is therefore by the court hereby ordered, that Joseph W. Alsop be and he is hereby appointed receiver in this cause, with power to enter upon and take possession of the railroad of the said Ohio and Mississippi Railroad Company, together with all supplies of materials, including fuel and oil, wherever situate,

belong to said company, and provided by it for the use of the said road, together with all side-tracks, switches, station-houses, warehouses, shops, water-stations and turn-tables, and all locomotives, engines, cars, and rolling stock of every kind and description, and all tools and implements used in operating or repairing said road and other property, or provided therefor by said company, and the moneys, credits, choses in action, books, papers, and all other property, real and personal, belonging to said company, by whatsoever name the same
42 may be known or designated, and the same to demand and collect by suit or otherwise, and to retain, hold, use, and dispose of, under and subject to the order of this court, or any judge thereof, to be made in this behalf, and therewith, until otherwise ordered by this court, or some judge thereof, said receiver, in the corporate name of said company, and by the exercise of its corporate franchises, shall maintain and keep in repair the said railroad, and operate and carry on the same to the best advantage for the interest of all parties concerned; and to this end the officers, agents, and employees of said company, having the custody or control of said property so to be taken possession of by said receiver as aforesaid, are hereby ordered and required forthwith, on the request of the said receiver, to surrender the same to him, his agents and employees, and the legal possession and control of all and singular said property and effects shall vest in said receiver immediately upon his taking the oath, and giving the bond as hereinafter required; and the said receiver is hereby authorized and empowered to retain and employ such counsel, agents, servants, laborers, accountants, clerks and assistants, as may be reasonably necessary under him, to carry this order into effect, with economy and pru-
43 dence, and to that end, and subject to the further order of this court, or any judge thereof, to appropriate and apply the property, money, and effects aforesaid, together with the current earnings of said road, and the business to be carried on in and about the prosecution of said business, so far as the same may be necessary; and in the corporate name of said company to enter into contracts for the obtaining of supplies for prosecuting said business, and for sustaining said road in proper repair and condition; and said receiver, acting in good faith under this order without negligence, and in the exercise of ordinary prudence and care, shall not be answerable in his individual right for any breach of contract to be entered into by him as such receiver, or for any injury to the person or property of third persons by accident in the prosecution of said business, or by the negligence of others employed by him in that behalf; and in regard to all such breaches of contract and damages to persons or property of third persons, and for the just protection of said receiver generally, the property and effects of said company in the hands of said receiver, together with the product of the business to be carried on as aforesaid, shall be amenable to be applied to the indemnification and protection of said receiver as may be lawful, and as by the court may be ordered. And it is further ordered
44 that said receiver, without unnecessary delay, upon entering upon his duties, shall make a schedule of all items of property, with an apt description of the same, which shall come into his hands under this order, and all choses in action and evidences of debt due to said company from third persons, and of all moneys on hand at the time he shall take possession under this order, and file the same in this cause. He shall keep in systematic order full accounts of his receipts and expenditures of money by himself and employees, and the surplus arising from said business he shall deposit in some bank or banks of good credit in the city of Cincinnati, or other points along the line of said road, and he shall not use or permit the same to be used, otherwise than in pursuance of the order of this court; and he shall within twenty-five days of the close of each calender month, and oftener if required by the court, file monthly statements of the receipts and expenditures, and a like statement of all liabilities incurred by him during the same month, which shall remain unsatisfied, and of all liabili-

ties of others incurred during the same time to the trust in his hands, remaining unpaid, with such other accounts and statements as may be necessary to a clear understanding of the condition of the trust in his hands at the period covered by each report, and in his accounts he shall discriminate between
45 receipts from the transaction of the business by him, and from other sources. Said receiver is hereby authorized at his discretion to dismiss from service any agent or employé of said company, other than the directors, treasurer and secretary, and before entering on his duties under this order he shall take an oath truly and faithfully to discharge his duties as receiver herein according to the best of his skill and understanding, in conformity with this order and such other orders as shall be made by the court herein, from time to time hereafter, and shall also give bond to the complaints, as obligors therein, for the use of all persons interested in said receivership, in the penal sum of fifty thousand dollars, conditioned for the true and faithful performance of his duties as receiver, and for the due and faithful payment over of all moneys which shall come into his hands as such receiver according to the order and direction of this court, to be held for the use of all persons interested in the subject-matter of this cause. And the said recever is hereby further authorized and empowered to audit and adjust all accounts against said company for supplies, labor and materials furnished to said company for the prosecution of its proper and legitimate business, and out of any surplus earnings over and above the current expenses of operating said road to pay the said accounts; provided, however, that
46 the said accounts shall have accrued within sixty days prior to this date; and the said receiver is hereby further authorized, out of the earnings of said road, from time to time to pay the moneys which shall become due under the existing contracts for the rolling stock which has been hired for its use by the said railroad company.

And on the same day, to wit, the ninth day of April, A. D. 1860, this cause came on for further hearing by the court at chambers sitting. And therefore the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

Order appointing temporary receiver.

E. D. Morgan & Co.
vs.
Ohio & Mississippi R. R. Co. *et al.* } Chancery.

On motion by the complainants, and it appearing to the court that due notice thereof has been served upon defendants herein, the court find that it is necessary for the care and preservation of the railroad of said company, and of the property sought to be subjected to the payment of the claims of the complainants, that a receiver should be appointed thereof; and the court having this day appointed Joseph W. Alsop as such receiver, and it being shown to the court that a short time must elapse before the said Alsop can personally take the possession of said property: Now, therefore, the court hereby orders that Edward Flint be, and he is hereby, appointed as the officer of the court to take and hold the possession of all and singular the property of the said railroad
47 company, subject to the order of this court, until the said Joseph W. Alsop, the receiver appointed shall appear, and, according to the order of the court, qualify and take possession of the said property; and the said Flint is hereby ordered at such time to deliver the possession of said property to the said receiver Alsop.

Afterwards, to wit, on the 20th day of April, A. D. 1860, there was filed in court here the bond of Joseph W. Alsop, receiver in the premises, which bond is in the words and figures following, to wit:

Receiver's bond.

Know all men by these presents, that we. Joseph W. Alsop, W. H. Clement, C. D. Coffin, S. S. L'Hommedieu and Jethro Mitchell, do acknowledge ourselves to owe and be indebted to Edward D. Morgan, George D. Morgan, John T. Terry and Solon Humphreys, composing the firm of E. D. Morgan & Co., in the penal sum of fifty thousand dollars, to the payment whereof, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators. The condition of this bond is as follows: That whereas the said Joseph W. Alsop has this day been appointed receiver by the circuit court of the United States for the seventh circuit and southern district of Ohio, in the case of E. D. Morgan & Co. against the Ohio and Mississippi Railroad Company and others, being a case in chancery, pending in said court, now if the said Joseph W. Alsop shall truly and faithfully perform
48 all the duties of receiver, and duly and faithfully pay over all moneys which come into his hands, as such receiver, according to the order and direction of said court, then the above obligation shall become void, else to remain in full force and virtue.

In testimony whereof, we have hereunto set our hands and seals, this ninth day of April, 1860.

JOSEPH W. ALSOP.	[SEAL.]
W. H. CLEMENT.	[SEAL.]
C. D. COFFIN.	[SEAL.]
S. S. L'HOMMEDIEU.	[SEAL.]
JETHRO MITCHELL.	[SEAL.]

Witness: E. FLINT.

Afterwards, to wit, on the 20th day of April, A. D. 1860, it being of the April term of the court aforesaid, for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

Zinn and Hannah made defendants.

E. D. MORGAN & Co.
vs.
OHIO & MISSISSIPPI RAILROAD Co. *et al.* } Chancery.

On motion to the court, and it appearing that Henry Hannah and Peter Zinn are holders of bonds of said company, and interested in the subject-matter of this suit, they are hereby made parties defendant in this cause, with leave to file answers therein by Wednesday next.

Afterwards, to wit, on the 20th day of April, A. D. 1860, there was filed in court here the answer of Peter Zinn in the premises, which answer is in the words and figures following, to wit:

Answer of Peter Zinn.

Circuit court of the United States, southern district of Ohio.

The answer and cross petition of Peter Zinn to the petition of E. D.
49 Morgan & Co. against the Ohio and Mississippi Railroad Company and others.

The said petition respectfully shows to this honorable court that he is the holder and owner of four of the second mortgage bonds of the said Ohio & Mississppi Railroad Company, of the same class as those held by the plaintiffs, and entitled to the same equities and rights; and that the coupons or interest war-

rants attached to three of the said bonds held by this petitioner, there has not been paid those falling due on the first day of April, 1856, and since that time; and on the other of said bonds, the coupons falling due on the first day of April, 1857, and since that time, have also not been paid, although the same has been requested; and that all of the said coupons, with interest thereon, are now due and payable to this petitioner.

And this petitioner further says, that he is also the holder and owner of two of the said third mortgage, or more particularly called "construction bonds," of the said railroad company, and that in the order of priority they are entitled to payment next in order to the said second mortgage bonds, and, except as to priority of payment, are entitled to the same equities, rights and liens as the said second mortgage bonds; and that of the coupons attached to the last of said bonds, and forming a part thereof, those falling due on the first day of September, 1858, and since that time, with interest thereon, have not been
50 paid, although payment thereof has been requested, and are now due and payable to this petitioner.

Petitioner further says that it is necessary to the proper security of your petitioner, and others having interests and rights in the said Ohio and Mississippi Railroad Company, and for the proper preservation of the said road and its operation, that some responsible citizen and resident of either the State of Ohio or Indiana should be appointed receiver of said road, to take charge of the operation and running of said road, and the preservation of the earnings and property of said road. That the present earnings of said road are equal to $1,000,000 per annum.

Petitioner further says, and charges the fact so to be, that large parts of the earnings of said road have heretofore been diverted by the managers thereof to the expense and management of a certain trust fund and the carrying out of a certain "capitalization scheme," so called, and that the said scheme is an combination intended to force said railroad to a sale, for the exclusive benefit of such parties only as may join in the same. That the said scheme was originated by and intended to be carried out for the exclusive benefit of the holders of fourth mortgage bonds, called "income bonds," and that the said capitalization scheme is not recognized by law or the charter of said company, and that so far as the same interferes with the payments of the
51 obligations and debts of said company out of the order provided by law and said charter, the said scheme and combination is illegal and void. Your petitioner therefore prays that a receiver of said road may be appointed, who is citizen and resident of either the State of Ohio or Indiana, and that he may be required to give bond, and to make monthly reports to said court of the earnings of said road and the disposal thereof; and that after the payment of current running expenses, that said receiver be required to deposit the balance of said earnings in some bank in the city of Cincinnati, and that no expenditures, aside from the strictly current running expenses, and the necessary repairs of track and machinery, may be made by said receiver, without being first ordered and directed by this court; and that after the payment of costs in this suit, that the said earnings may be applied to the payment of the coupons of interest and indebtedness of said company, in the order and according to the priority established by law, and as may be ordered by this court.

PETER ZINN.

STATE OF OHIO, *Hamilton county, ss:*

Peter Zinn, being first duly sworn, states upon oath that the matters stated in the foregoing answer and cross petition are true, as he verily believes.

PETER ZINN.

Sworn to before me, and subscribed by the said Peter Zinn, in my presence,

52 [SEAL.] this 18th day of April, 1860. In testimony whereof, I have hereunto set my hand and notarial seal on the day and year last aforesaid.

SAMUEL B. CARTER,
Notary Public, Hamilton County, Ohio.

Further instructions to receiver.

Afterwards, to wit, on the 27th day of April, A. D. 1860, it being of the April term of the court aforesaid, for the year last aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following to wit:

E. D. MORGAN & Co.
vs.
THE OHIO & MISSISSIPPI R. R. Co. } In Chancery.

It appearing to the court that it is necessary, for the successful prosecution of the business of the road of the defendants in this cause, that further directions should be given to the receiver, it is ordered that the said receiver, out of the receipts of the business of the company, after paying current expenses, pay, from time to time, as he shall be able so to do, the proper and legal taxes and assessments on the property of the company, and the ground rents due and to become due under leases, also the balances due and to become due to other companies with which this company has running arrangements in reference to the transportation of freight and passengers, and amounts due and to become due for injuries to cattle along the line of the road, and to property transported by the company, and amounts due and to become due under con-
53 tract for the hire of rolling stock in use by the company, and also the interest on the first mortgage bonds of said company. And the court being advised that it may be necessary to borrow some funds in anticipation of the receipts of the road, in order to promptly meet the engagements of the company, it is further ordered that the receiver be permitted to borrow money in the name of the company, to anticipate the reasonable reliable receipts of the road, to enable the receiver to meet promptly existing engagements; and that when he shall so borrow, he shall forthwith report to the court the sum borrowed, and the time the loan has to run.

Further time for answer of Hannah.

And on the same to-day, to wit, the 27th day of April, it being the term of the court last aforesaid, for the year last aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
OHIO & MISSISSIPPI R. R. Co. } Chancery.

On motion to the court, the time for answer of Henry Hannah herein is extended to 15th May next.

Receiver's report.

Afterwards, to wit, on the 27th day of April, A. D. 1860, there was filed in court here by the receiver his report as to the property that came to his hands, which report is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. MORGAN & Co.
vs.
54 THE OHIO & MISSISSIPPI RAILROAD COMPANY and others.

To the hon. the circuit court of the United States for 7th circuit and southern district of Ohio:

The undersigned, receiver, &c., in the above cause, in obedience to the decretal order of the court, now here reports to the court schedules of property which have come to his hands as such receiver, and all claims due to the said company, and moneys on hand, &c., and also a schedule of rolling stock in the possession of said company, and by the company used in its business, belonging to Wm. H. Aspinwall and others, and in use as above stated under a contract between the said Aspinwall and others and said company, which schedules are severally marked A, B, C, D, E.

And the undersigned represents to the court that it is necessary for the successful prosecution of the business of the road that, out of the receipts of its business, after paying current expenses, there be paid, from time to time as he shall be able so to do, the proper and legal taxes and assessment on the property of the company, and the ground rents due and to become due under leases; also the balances due and to become due to other companies with which the company has running arrangements in reference to the transportation of freight and passengers; and amounts due and to become due for injuries to cattle along the line of the road, and to property transported by the company; and
55 amounts due and to become due under contracts for the hire of rolling stock in use by the company, and interest on the first mortgage bonds of said company. The undersigned, therefore, asks for specific authority to make said payments. And as it may be necessary, in order to promptly meet the engagements of the company, to anticipate the receipts of the road by borrowing money, the undersigned asks authority for that purpose.

JOS. W. ADSUP, *Receiver.*

The schedules referred to in the report of the receiver, and made a part thereof, are in the words and figures following, to wit:

SCHEDULE A.

Old floating debt.

Bills payable.	When due.	Amount.
To Reese E. Price	1855, Jan'y 1	$1,150 00
" Allen, McGrady & Co	" Feb'y 20	1,500
" Douglass, Smith & Co	" April 17	251 89
" ----do	" " 20	600
" New England Car Spring Co	" May 11	530 50
" H. F. Baker, (held by Henry Clark)	" " 19	1,500
" Moore & Richardson	" " 27	347 22
" Henry Cole	" June 2	2,195
" Freeman Munger	" " 4	25
" Campbell, Ellison & Co	" " 12	700
" Gerard & Crossley	" " 25	36 72
" ——— O'Brien	" " 25	188 70
" A. T. Smith	" July 2	300
" Matthew Job	" " 4	75
To Douglass, Smith & Co	" " 1	139 35
56 " Douglass, Smith & Co	" " 1	509 16
" W. P. Chappell & Co	" " 20	470 25
To Douglass, Smith & Co	" " 25	880
" J. R. Wilde	" Aug't 5	119
" Cobb & Adamson	" " 5	47 50
" W. P. Chappell & Co	" " 16	939 82
" Michael Shultz	" Sep'r 6	462 65
" Washington Ins. Co	" " 8	2,500
" Bank of Commerce	" " 17	(Bal.) 320 09
" Douglass, Smith & Co	" Oct'r 1	158
" ----do	" " 1	175
" W. P. Chappell & Co	" " 2	845 77
" Thomas Frith	" " 8	527 25
" James Johnson	" " 8	978 80
" ——— Hopple	" " 19	1,417 11
" Douglass, Smith & Co	" Nov'r 5	980
" ----do	" " 5	1,000
" ----do	1856, Jan'y 1	502
" ----do	" " 1	445
" Reese E. Price	" " 25	2,500
" Douglass, Smith & Co	" Feb'y 5	980
" ----do	" " 5	1,000
" G. W. Elrod	" Ap'l 10	75
To ——— Smithson	" May 5	3,787 46
57 " George Shockley	1857, Feb'y 1	50
" Josephus Clark	" Nov'r 9	200
To Bank of Commerce	1855, Sep'r 17	1,000
" -----do	" " 17	1,000
" Co.'s note, to order of J. F. Franklin	" July 6	5,000
" ---do----------do	" " 6	5,000
" Horne & Longworth, bond, Oct. 17, '54, with int. at 8 per cent. from date	----------	10,000
Obligations of the company to pay to the city of Cincinnati for the White Water Canal Co	----------	53,409 24 15,000
		68,409 24

Judgments.	No.	Term.	Amount.
In favor of—			
P. Young, superior court, Cin'ti	2293	May, 1855	$122 62
J. S. G. Burt, " " "	3483	Dec'r, "	1,014 16
Wm. W. Wood, " " "	3597	" "	374 35
Young & Pomeroy, " " "	3659	" "	4,520 90
Wann & McBirney, " " "	3858	" "	1,622 66
Geo. W. Cochran, " (conditional,) Cin'ti	3882	" "	10,000 00
B. Chamberlain, Ham. common pleas	14448	" "	10,104 75
J. L Wayne, superior court, Cin'ti	3707	Jan'y, 1856	332 29
John Kizer, " " "	3751	" "	385 20
D. F. Goodhue, " " "	3767	" "	5,837 92
James Martin, " " "	3828	" "	121 38
58 William Coffin, " " "	3823	" "	1,026
Ira Wood, " " "	3873	" "	827 50
Benjamin Wilson, " " "	3667	Feb'y, "	525 30
P. Lodwick, " " "	3968	March, "	616 56
J. S. G. Burt, " " "	4221	" "	1,015
John Roberts, Wm. Chidsey, esq			200
Culbertson, Means & Co., superior ct.			300
Wm. M. Patton, " "		May, 1857	1,031 28
H. Clearwater, " "			1,037 42
Chas. Neave, " "			2,140 34
A. T. Perry, " "		Nov'r, 1857	1,233 47
			44,389 10
Harris, Black & Co., " "		May, 1856	3,221 14
Calvin Holmes, " "	4356		2,835 79
			50,446 03

BOOK ACCOUNTS.

Due to—	
Abner T Ellis	$1,448 52
R. M. Graham, engineer	25
R. W. Tuttle, "	310
T. D Wisner, "	36
W. W. Robertson, "	84 85
C. E. Conkwright, "	18 55
W. Kenedy, "	137 26
E. Detweiler, "	157
J. C. L. Campbell, "	55
Brooks, Bryant & McMahan	38 98
59 Harvey, Mason & Co.	10 25
Emison & Green	7 50
R. B. Jessup	20 00
A. B. Coleman	640
Marsh & Co.	120 00
Omnibus Co	3,035 38
M. McDorrell	233 50
	6,377 79

Schedule B.

"Eastern division Ohio and Mississippi Railroad Company." Statement of liabilities and assets of the company rendered to Joseph W. Alsop, receiver, to 9th day of April, 1860, *as far as can be now ascertained.*

Capital stock liabilities	$6,478,854
Loan from city of Cincinnati	600,000
2,050 first mortgage bonds, due July 1, 1872	2,050,000

Coupons of interest unpaid from Jan'y 1, 1858, to Jan'y 1, 1860	$206,045 00	
Int. on coupons to Ap'l 1, '60	12,364 55	
		$218,409 55
258 second mortgage bonds, due Oct'r 1st, 1880		258,000
Coupons of interest unpaid to April 1, 1860	$84,980 00	
Int. on coupons to Ap'l 1, '60	10,754 10	
		95,734 10
4,242 construction bonds, due March 1, 1876		4,242,000
Coupons of int. unpaid from Sept. 1, '57, to March 1, '60	$742,350 00	
Int. on coupons to April 1, '60	47,513 38	
		789,863 38
3,320 income bonds, due May 1, 1881		3,320,000
Coupons of int. unpaid from Nov. 1, '57, to May 1, '60	$581,000	
Int. on coupons to Ap'l 1, '60	32,315 16	
		613,535 16

Old floating debt prior to May 1, 1856.

Viz: bills payable	$68,409 24	
judgments	50,446 03	
open accounts	6,377 79	
Int. on the above, say	11,750 00	
		136,983 06
Arrearages due employees of the road and bills of supplies to May 1, 1856		7,262 52
Do do from May 1, '56, to May 1, '58		4,447 66
Do do from May 1, '58, to Feb'y 1, '60		5,118 96
Do do from Feb'y 1, '60, to Ap'l 1, '60		74,774 54
Notes due W. H. Aspinwall and ass'ts, dated Sept. 1, 1858:		
One note for	$215,800	
" " "	57,757 11	
" " "	18,175 31	
" " "	68,267 58	
		360,000
Int. from Sept. 1, '58, to Ap'l 1, '60		34,200
Due W. H. Aspinwall and ass'ts for use of rolling stock to Ap'l 1, '60, as approved by the board of directors		96,110 56
Due to foreign roads		574 67
Notes to Ch's Kilgour due May 15, '60		6,100
Drafts for charges unpaid		31,188 46

ASSETS.

Cash on hand April 9, 1860	$39,695 91
Due from New York office	4,973 84
" from W. division on earnings a'c	14,479 37
" " do charges	27,724 05
" " Adams Express Co	3,037 50
" " General P O. Department	11,087 41
" " Alfred Gaither	3,158 20
Bills receivable:	
Notes due from individuals	584
Due from agents on line of road	6,688 84
" " foreign roads	845 30

* Capital stock liabilities as above	$6,478,854
And amount left with the city of Cincinnati as collateral on loan of $600,000	1,000,000
Total stock out	7,478,854

60 SCHEDULE C.

Statement of equipment, tools, furniture, and movable fixtures, also stock and materials on hand for renewals and repairs, and for transportation purposes, on the eastern division of the Ohio and Mississippi railroad, April 16th, 1860:

No. of locomotive engines	34
No. of passenger cars	31
No. of mail and baggage cars	10
No. of box freight cars	223
No. of stock cars	66
No. of flat cars	88
No. of " of the inside bearing, nearly worthless	77
No. of gravel cars	45
No. of hand cars	41
No. of pole cars	26

A portion of the equipment mentioned in the foregoing list is in the shops for repairs.

At Storr's station there is a small quantity of tools, furniture, and fixtures for renewals and repairs of machinery and cars.

At Cochran shops there is a large amount of tools, consisting of stationary power, belting, shafts, lathes, drills, planers, and wheel-press, and also the various fixtures and materials for renewals and repairs of engines and cars necessary in operating the road.

At Seymour there is a quantity of tools and fixtures for renewals and repairs of machinery and cars.

61 At Vincennes's shops there are the ordinary tools of a repair shop for engines, stationary power, belting, shafts, lathes, drills, planers, and the necessary fixtures and material for repairs of engines, and light repairs upon cars.

At Cincinnati station there are the necessary desks, safes, and other furniture for carrying on the business of the station.

At the following stations there are the necessary desks, safes, chairs, and furniture, and fixtures for carrying on the business of the station, viz: Lawrenceburgh, Aurora, Moore's Hill, Osgood, North Vernon, Seymour, Brownstown, Medora, Mitchell, Huron, Loogootee, Washington, and Vincennes.

At different points along the line, when needed for use in repairing the track, bridges, and roadway, are the necessary tools for that purpose—such as shovels, picks, crow-bars, spike-drawers, hammers, tamping-bars, chisels, saws, and tackle.

The telegraphic line, in which the company possesses a part interest with the Western Union Telegraph Company, as specified in a contract concerning the same, and the necessary instruments and fixtures for the operation of the same.

The number of cross-ties along the line is	7,972
The number of cords of wood along the line is	7,445

62 The quantity of wood and cross-ties on hand is constantly changing, being varied by amounts all the while, being purchased and used along the road.

SCHEDULE D.

Synopsis of the bonded debt of the Ohio and Mississippi Railroad Company.

2,050	first mortgage bonds		$2,050,000
258	second .....do		258,000
4,242	construction.do		4,242,000
3,320	income.....do		3,320,000
			9,870,000
	Interest on first mortgage bonds due	$206,045 00	
	Interest on same, calculated on coupons from their maturity to Ap'l 1st, 1860, at 6 per cent	12,364 55	
			$218,409 55
	Interest on second mortgage bonds due	84,980 00	
	Interest on same, calculated on coupons from their maturity to April 1, 1860, at 6 p'r c't..	10,754 10	
			95,734 10
	Interest on construction bonds due	742,350 00	
	Interest on same, calculated on coupons from their maturity to April 1, 1860, at 6 p'r c't..	47,513 38	
			789,863 38
63	Int. on income bonds due	581,000 00	
	Int. on same, calculated to April 1, 1860, at 6 p'r c't	32,536 16	
			613,535 16
	Total		1,717,542 19

SCHEDULE E.

Statement of the engines and cars in use on the eastern division of the Ohio and Mississippi railroad, belonging to W. H. Aspinwall and others, commonly known as the "associates," and worked under a contract for the use of the same.

No. of locomotive engines, including those in shop for repairs, marked A..	14
No. of passenger cars, marked A	3
No. of mail baggage and express cars, marked A	4
No. of box freight cars, marked A	161

A portion of the above list is in the shops for repairs.

Receiver's report.

Afterwards, to wit, on the third day of May, 1860, there was filed in court here, by Jos. W. Alsop, receiver, his report in the premises, which report is in the words and figures following, to wit:

U. S. circuit court, 7th circuit, S. dist. of O.

E. D. MORGAN & Co.
vs.
THE O. & MISS. R. R. CO. *et al.*

The undersigned respectfully reports to the court, that on the 30th day of April, A. D. 1860, he borrowed from the Commercial Bank of Cincinnati, in

pursuance of the authority heretofore given him, the sum of $14,867 50, being $15,000 less the discount on the notes of the O. & M. R. R. Co., endorsed by himself; one for $5,000, payable in 30 days, and the other for $10,000,
64 payable in 60 days after date, April 30th, 1860. This loan was made at the rate of six per cent. per annum, and was for the purpose of paying over-due interest on first mortgage bonds of the co.

Cincinnati, May 1st, 1860.

JOS. W. ALSOP, *Receiver.*

Answer of Henry Hanna.

Afterwards, to wit, on the twenty-first day of May, A. D. 1860, there was filed in court here, by John W. Herron, solicitor for the defendant, Henry Hanna, his answer in the premises, which answer is in the words and figures following, to wit:

U. S. circuit court, S. D., O.

E. D. Morgan & Co.
vs.
The Ohio and Mississippi Railroad Company *et al.*

Answer of Henry Hanna.

The defendant, reserving all and every exception to the many errors, &c., in said petition, and in answer thereto, or to so much thereof as he is advised it is necessary for him to answer, says: That he admits the execution of the mortgage, as set forth in plaintiff's petition, but that he has no personal knowledge as to how many of the bonds intended to be secured thereby, if any are held by said plaintiffs, nor as to whether the interest on said bonds, if any are held by them, has been paid, and thereof requires strict proof.

Defendant, further answering, says: That the property covered by said plaintiff's mortgage consists of 192 miles of railroad, running from the foot of Wood street, in the city of Cincinnati, to the city of Vincennes, in the State of Indiana, and there connecting with the western or Illinois division of the said Ohio
65 and Mississippi railroad to the city of St. Louis, including large and valuable depot grounds and buildings in Cincinnati and other points on the said road, side tracks and other appurtenances belonging thereto, engines, cars, &c., necessary to run the same.

That the cost of said road was $, represented as follows: $2,050,000 of first mortgage bonds, $258,000 second mortgage bonds, $4,242,000 construction bonds, $3,320,000 income bonds, $6,100,000 of stock, and at least one million of dollars of active liabilities. That several years since an arrangement was made between the said company and a company of New York capitalists, whereby the latter agreed to finish the said road, and receive their compensation in the construction and income bonds of said company, and the said company placed in the hands of the capitalists the entire management and control of the said road, assigning to them sufficient stock to enable them to elect all the officers of the said company; and the said parties have ever since, up to the present time, had the sole and exclusive control of all of the departments of the said company, and managed the said road, as to them seemed best; and at the same time, said parties opened in the city of New York an office of the said company, where the main financial arrangements are made, and where the directors hold most of their meetings; and defendant avers that the said removal has been productive of serious loss, and increased expenses to the
66 said company.

And defendant further states that, about one year since the said New

York associates, who were the holders of all the income bonds issued by said company, proposed a scheme for the capitalization of the various interests, and a large reduction of the liabilities of said company; that this scheme provided that the stockholders should accept of new stock, at the rate of 10c. on a dollar of the amount held by them; that the holders of the floating debt and income bonds should exchange the same for new stock at par, and the holders of the second mortgage and construction bonds should transfer one-third said bonds into said stock at par; that thereby the bonded debt would be reduced to the sum of about five millions of dollars, and the stock to the sum of seven million and a half of dollars; that a large majority of all parties interested in said road accepted of the said proposition, and Wm. H. Aspinwall, Jos. W. Alsop, Edwin Bartlett, David Leavitt, Edward Learned, Sam'l W. Comstock, and Wm. A. Booth, were appointed trustees, to whom were assigned the bonds and stock intended thereby to be cancelled, and certificates issued to the several parties.

And defendant avers that, at that time, he was the owner of seventy-five construction bonds, and signed said agreement, and delivered up to be
67 cancelled 25 of said bonds, and accepted in lieu thereof trust certificates of stock under said arrangement; that the inducement held out to said defendant, and on which he acted in signing said agreement, was, that he thereby made his remaining bonds perfectly secure; that he considered the stock certificates which he received as valueless, but believing the said road to be fully worth the sum of five million of dollars, and able to pay the interest of the remaining bonds, he supposed that he would thereby make more valuable the said bonds still held by him.

Defendant further states that the receipts of the said road during the past year, depressed as the business of the country has been, over the sum of one million of dollars, of which, under proper management, the net receipts should be between four and five hundred thousand dollars. That the receipts have been sufficient during all the said time to pay the interest on the said five millions of dollars, and all expenses and repairs on the said road. But defendant charges that no part of the said receipts has been applied to the payment of said interest, except perhaps a small part to the payment of the interest on the first mortgage bonds; but the said interest has been permitted to fall regularly in arrear, and defendant therefore charges, that if said plaintiff's interest
68 is not paid, it is not because the said road has not earned sufficient to pay the same, but because the directors have not seen proper to apply said receipts to that purpose. That of the second mortgage bonds there are outstanding only 218, on which the annual interest is $15,260, much less than the net receipts of any one month of said road. And defendant further charges, that, not satisfied with the arrangement herein set forth, in the month of February the said directors made a new proposition to the holders of the remaining construction bonds, requesting them to cancel said bonds, and accept in lieu thereof the stock of said company at the rate of one dollar and fifty cents on a dollar of said bonds with a reduction of ten cents on a dollar on said amount for every month after March 31, 1860, that the holders of said bonds should decline cancelling the same. That about the same time the said last mentioned proposition was made, this present suit was brought by plaintiffs; and defendant avers that the said company has refused to pay the interest on said bonds to plaintiffs, with the purpose of forcing this defendant and others to accept the said proposition, in the fear that if they failed to do so the said road would be sold and their interest therein destroyed, and with the further intention that if said defendant and others should decline to ac-
69 cept said proposition to permit the said road to be sold, and purchased by the said New York associates who own or control the large majority of the bonds of the road, and who could thus purchase the same at some nominal price; and defendant is unwilling to accept of said proposition because it

will place his property in said road entirely at the mercy of said parties, and will render it of little or no value. That he accepted the first proposition for compromise in good faith, and has always been and is still willing to comply with the same in good faith.

Defendant further avers that the receiver of the said road appointed by this court is a citizen of the State of New York; is president of the said company, but has never, except for short periods, attended to the practical operation of said road; that he is one of the trustees of said capitalization scheme, and a leading member of the said New York associates, and personally interested in forcing the said road to be sold.

And defendant further avers that the sale of said road is entirely unnecessary, and would at present be ruinous to the interests of this defendant and others, and only advantageous to the parties at present controlling the said road; and that this suit is prosecuted by an understanding with the said parties,
70 and is subject to their control and direction; and that a sale of the said road will be urged or postponed as may be desired by them.

Defendant therefore prays that the receiver heretofore appointed may be removed and some other party appointed in his place. That the income of the road may be appropriated to paying the back interest due to plaintiffs, and for such other relief in the premises as the peculiar nature of the case may admit. He also prays that if the said road is ordered to be sold, it may be appraised under the statute of the State of Ohio regulating sales of real estate in such cases.

JOHN W. HERRON,
Solicitor of Defendant, H. Hanna.

STATE OF OHIO, *Hamilton County, ss:*

Henry Hanna, the above named respondent, being duly sworn, says that the matters and things stated in the foregoing answer are true of his own knowledge, except as to matter stated on information and belief; and as to those, that he believes it to be true.

HENRY HANNA.

Signed in my presence, and sworn to before me, this 11th day of May, 1860.
SAMUEL R. MATTHEWS, [SEAL.]
Notary Public.

25 cts. pd. notary by d'ft.

Afterwards, to wit, on the twenty-third day of May, A. D. 1860, it being of the April term of the court aforesaid for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures
71 following, to wit:

Entry making R. W. Keys d'f't.

E. D. MORGAN & Co.
vs.
THE OHIO AND MISS. RAILROAD Co. *et al.* } Chancery.

On motion to the court by King and Thompson, defendant's attorneys, it is ordered that R. W. Keys be made a party defendant herein, and leave is granted the said defendant, the several parties hereto hereby consenting, to file his answer forthwith; and answer filed. The answer of R. W. Keys referred to in the foregoing entry is in the words and figures following, to wit:

Answer of R. W. Keys.

The answer and cross-bill of Richard W. Keys, one of the defendants, to the bill of complaint of E. D. Morgan & Co., complainants.

This defendant, now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that may be taken to the errors, uncertainties, and imperfections of said bill, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, saith:

That at the December term of the superior court of Cincinnati, within and for the county of Hamilton and State of Ohio, in the year 1855, a judgment was entered up by confession in favor of one George W. Cochran, and against said the Ohio and Mississippi Railroad Company, for the sum of ten thousand dollars ($10,000,) in case No. 3882 on the docket of said court, all
72 which will more fully appear by reference to a transcript of said judgment hereto attached as a part of this answer and marked A.

That subsequently, to wit, on the 17th day of July, A. D. 1857, said George W. Cochran, for a good and valuable consideration, sold and assigned said judgment to this defendant, who hath ever since owned and now doth own and hold the same. The within instrument of assignment was filed in said superior court of Cincinnati on the 19th day of July, 1857, and a true copy thereof is hereto attached, marked B, and to which reference is hereby made.

That said judgment still remains unreserved and in full force and effect, and bears interest from the day of its entry, to wit, on the 20th day of December, 1855. This defendant further avers and claims that said judgment is a good and valid lien upon all the lands, tenements, and premises set forth in said complainant's bill, and this defendant is entitled to have said judgment, interest, and costs paid out of the proceeds of the sale of said premises. He further claims that said deed of trust or mortgage described in said bill is not effectual to convey any property not owned by said company at the time said deed or mortgage was executed, and as to all real estate subsequently acquired, the said judgment is the first and best lien thereon.

73 This defendant prays that this, his answer, may be taken also as cross-bill against his co-defendants and the said complainants; and that upon the hearing hereof, such decree may be entered as shall protect this defendant in his lien upon said premises described in said bill, whether owned by said company at the time of the execution of said deed of trust or mortgage or subsequently acquired, and that all his rights may be protected by the court.

By KING & THOMPSON,
Solicitors for R. W. Keys.

STATE OF OHIO,
Hamilton County, ss:

Richard W. Keys, the defendant named in the foregoing answer, makes oath and says, that the matters and things set forth in said answer and cross bill are true according to the best of his knowledge, information and belief.

RICH. W. KEYS.

Sworn to and subscribed before me this 21st day of May, A. D. 1860.

FRED. C. JONES, [SEAL.]
Notary Public, Ham. Co., Ohio.

Fee 25 cts., paid.

The exhibits referred to in the foregoing answer and cross-bill are in the words and figures following, to wit:

Exhibit A.

THE STATE OF OHIO, *Hamilton County, City of Cincinnati, ss:*

Superior court of Cincinnati.

Be it remembered that on the 21st day of December, in the term of December, A. D. 1855, of the superior court of Cincinnati, before the honorable W. Y. Gholson, one of the judges of said court, amongst other things the following judgment confessed was had and entered on the journal of said court in
74 the words and figures following, to wit:

GEORGE W. COCHRAN
ag't
THE OHIO AND MISSISSIPPI RAILROAD COMPANY. } Judg't confessed.

This day came the said George W. Cochran, by Spooner & Brower, his attorneys, and filed his petition against the Ohio and Mississippi Railroad Company, defendant; and thereupon came Alexander Paddock, esq., an attorney of this court, on behalf of the said defendant, and by virtue of a certain power of attorney by said defendant executed for that purpose, by him produced and filed on behalf of said defendant, waives process, receives said petition, acknowledges that said defendant owes the said plaintiff the sum of ten thousand dollars, with interest from the 20th day of December, A. D. 1855, upon the cause of action stated in said petition, and confesses a judgment against said defendant in favor of said plaintiff for said sum of $10,000, and the costs of the plaintiff herein expended, taxed at $3 50; and thereon waives and releases all errors and all right of petition in error, and subscribes his name hereto.

The Ohio and Mississippi Railroad Company by their attorney in fact, Alex. Paddock.

Therefore it is considered that the plaintiff recover of the defendant his said damages confessed, and his costs herein expended, taxed at $3 50, said damages to bear interest from the 20th day of December, 1855; judgment confessed, $10,000; plaintiff's costs, $3 50.

THE STATE OF OHIO, *Hamilton County, City of Cincinnati, ss:*

Superior court of Cincinnati.

75 I, Richard H. Stone, clerk of the superior court of Cincinnati, do hereby certify the above and foregoing to be a true and correct copy of the judgment entry, had and entered on the journal of said court in the cause wherein George W. Cochran was plaintiff, and the Ohio and Mississippi Railroad Company was defendant, as the same appears from said journal, page 3699, now remaining in my office.

Witness my hand and seal of the said court at Cincinnati, this 17th day of May, A. D. 1860.

[SEAL.]

R. S. STONE,
Clerk S. C. C., H. C., O.

Exhibit B.

Superior court of Cincinnati, No. 3882.

GEORGE W. COCHRAN, plaintiff,
ag't
THE OHIO AND MISSISSIPPI R. R. CO., defendant. } Judgment for plaintiff, Dec. term, 1855, for $10,000 damages and $3 50 costs.

Whereas, in the above named cause, I, George W. Cochran, the plaintiff above named, did recover a judgment in my favor against the said defendant,

"The Ohio and Mississippi Railroad Company," for the sum of ten thousand dollars ($10,000) damages and $3 50 costs, as above set forth, at the December term of said superior court in the year 1855, all which will more fully appear by reference to the records of said court: Now, for value received by me from Richard W. Keys, of Hamilton county, Ohio, I, the said George W. Cochran, do hereby sell, grant, assign and transfer to said Richard W. Keys, his executors, administrators and assigns, the said judgment and all the estate, right, title, interest and demand whatsoever, which I, the said George W. Cochran,
76 have or ever did have therein; and I do hereby, for myself, my executors and administrators, consent and agree to and with the said Richard W. Keys, his executors, administrators and assigns, that the said judgment is a good, valid, subsisting judgment, and that the same will never be reversed or set aside; that no part thereof has been paid, and that the same has not or any part thereof been released, discharged or assigned, and that neither myself, executors, or administrators, ever will attempt to release or assign the same or any part thereof, or do anything to hinder or delay the said Keys, his executors, administrators, or assigns, from collecting said judgment; and said Keys and his proper legal representatives are hereby authorized to use my name, if necessary, in the collection of said judgment.

This assignment is made without recourse to me, the said George W. Cochran, so long as said judgment continues to be as warranted, a good, valid, and subsisting judgment, and all efforts to collect the same are to be made at the costs of said Keys and his proper legal representatives in that behalf.

In witness whereof, I, the said George W. Cochran, have hereunto set my hand and seal on this 12th day of June, 1857.

[SEAL.

GEO. W. COCHRAN.

Attest: J. H. WILSON,
JNO. K. STERRETT.

Endorsed: File June 19th, '57.

THOMAS SPOONER, *Clerk.*
E. PAGE, *Deputy.*

THE STATE OF OHIO,
Hamilton County, City of Cincinnati, ss:

Superior court of Cincinnati.

77 I, Richard H. Stone, clerk of the superior court of Cincinnati, do hereby certify the above and foregoing to be a true and correct copy of the assignment of judgment in the case wherein George W. Cochran is plaintiff, and the Ohio and Mississippi Railroad Company is defendant, as the same appears from the original now on file in my office.

Witness my hand and the seal of the said court at Cincinnati, this 16th day of May, A. D. 1860.

[SEAL]

R. H. STONE,
Clerk S. C. C., H. C., O.

Afterwards, to wit, on the 31st day of May, A. D. 1860, there was filed in court here the receiver's 3d report in the premises, which report is in the words and figures following, to wit:

Receiver's third report.

OHIO AND MISSISSIPPI RAILROAD COMPANY.

Report of receipts and payments of Joseph W. Alsop, receiver, from the 9th to the 30th day of April, 1860, inclusive.

1860.				1860.			
April 9	To amount of cash on hand		$44,669 75	April.	By amount paid arrearage for March current expenses in operating the road	$72,694 23	
	RECEIPTS.				amount paid on ac. of April current expenses	6,010 75	
30	To balance collected of agents	$6,688 84			amount paid on ac. of arrearages prior to March	680 51	
	Do. collected of the Adams Express Co	3,037 50			amount paid on account of construction work	727 87	
	amount rec'd on ac. of April earnings	30,437 07			amount paid draft for charges on account with foreign roads	38,633 77	
	amount received of foreign roads	18,120 87			amount paid interest and discount	1,306 85	
	amount received of foreign roads on charges ac	31,935 79			amount paid sundry office expenses	1,238 84	
	amount received from other sources	15,293 33			amount paid on ac. of telegraph instruments	52 16	
			105,513 36		amount paid foreign roads on ac.	9 12	
						121,354 10	
					Balance carried to May ac.	28,829 01	
			150,183 11				$150,183 11
May 1	To balance brought down	28,829 01					

JOS. W. ALSOP, *Receiver.*

Instructions to clerk of the court.

78 Afterwards, to wit, on the 25th day of June, A. D. 1860, it being of the special and adjourned term of June for the year last aforesaid of the court aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY AND OTHERS. } In Chancery.

It is ordered by the court that the clerk make out and transmit to the clerk of the circuit court of the United States for the district of Indiana copies of the receiver's reports of receipts and disbursements on file, and that hereafter, as further reports are filed, the clerk make out and transmit copies of such reports, to the end that said copies may be filed in the cause between the same parties pending in said circuit court for said district of Indiana.

Receiver's fourth report.

Afterwards, to wit, on the 29th day of June, A. D. 1860, there was filed in the office of the clerk of the court aforesaid the receiver's 4th report in the premises, which report is in the words and figures following, to wit:

DR. *Joseph W. Alsop, receiver, in ac. with the Ohio and Mississippi Railroad Company.* CR.

1860.				1860.			
May 1	To cash—balance on hand		$28,829 01	May 31	By amount paid on ac. of April current expenses in operating the road		$63,095 66
	RECEIPTS.				Paid on ac. of arrearages prior to April, 1860		886 01
31	Received on acc't of mail pay, for quarter ending March 31	$1,554 40			May current expenses	$4,348 08	
	on acc't of passenger and freight business prior to May 1st	7,506 91			sundry office expenses	574 03	
	for express business prior to May 1st	2,812 50			interest and discount	591 76	
			11,873 81				5,513 87
	on ac. of passenger and freight business of May		68,331 26		Paid on ac. of first mortgage coupons of interest		20,265 00
	of foreign roads, on charges ac	18,995 10			drafts for charges advanced to foreign roads		3,489 60
	Less paid charges, drafts	15,930 89					93,250 14
			3,064 21		Balance carried to June ac		21,048 65
	Received from other sources		2,200 50				
			114,298 79				114,298 79

JOS. W. ALSOP, *Receiver.*

Receiver's fifth report.

79 Afterwards, to wit, on the fourth day of July, A. D. 1860, there was filed in the office of the clerk of the court aforesaid the receiver's 5th report in the premises, which report is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. MORGAN & Co.
against
THE OHIO AND MISSISSIPPI RAILROAD COMPANY AND OTHERS. } In Chancery.

The undersigned reports to the court, that on the 16th June, 1860, he borrowed from the Commercial Bank of Cincinnati $10,000, for the use of said company, upon the note of the company, dated June 16, 1860, payable at sixty days after date, and received as net proceeds $9,895. He also reports that he has paid the note due in thirty days specified in a former report.

June 25, 1860.

JOSEPH W. ALSOP, *Receiver.*

Afterwards, to wit, on the 25th day of July, A. D. 1860, there was filed in the office of the clerk aforesaid the receiver's 3d monthly report, which report is in the words and figures following, to wit:

Receiver's third monthly report.

Third monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company. Receipts and disbursements for the month of June, 1860.

To balance on hand from May account		$21,048 65
RECEIPTS.		
From General Post Office for mail service to 31st March, 1860	$9,301 85	
passenger and freight earnings in May last	18,036 96	
80 Adams's Express earnings in May last	3,037 50	
		30,376 31
passengers of June earnings	32,331 28	
freight of June earnings	18,740 05	
		51,071 33
other sources		5,897 33
Total funds		108,393 62
DISBURSEMENTS.		
Paid on acc't of first mortgage bonds coupons of Jan'y 1st, 1860	5,005 00	
on interest and discount	567 46	
on office, petty, and other expenses	666 29	
on charges advanced on account with other roads	3,519 48	
on acc't of current operating expenses and construction in May	63,111 22	
on acc't of former arrearages prior to May 1st	650 35	
on acc't of June current expenses	1,869 31	
		75,389 11
Balance on hand carried to July acc't		33,004 51

JOS. W. ALSOP, *Receiver.*

81 *Receiver's fourth monthly report.*

Afterwards, to wit, on the 24th day of August, A. D. 1860, there was filed in the office of the clerk of the court aforesaid the receiver's 4th monthly report in the premises, which report is in the words and figures following, to wit:

Fourth monthly report of Joseph W. Alsop, "receiver" of the Ohio and Mississippi Railroad Co., for July, 1860.

Balance on hand from June account		$33,004 51
RECEIPTS.		
From express freight earnings of June	$1,651 76	
" passengers prior to July	10,434 86	
" freight " "	6,673 33	
		18,759 95
" passengers on acc't of July earnings	32,165 50	
" freight do. do.	18,749 70	
		50,915 20
" other sources		10,399 97
		113,079 63
DISBURSEMENTS.		
Paid on account of first mortgage bond coupons of interest due Jan'y 1st, 1860	$15,015 00	
" interest and discount	575 12	
" on account of office and other expenses	693 23	
" on account of balance due other roads	102 60	
" charges advanced on account with other roads	1,745 97	
Paid on account of former arrearages	4,450 37	
82 Paid on account of current operating expenses and construction work for the month of June	63,561 85	
		86,144 15
Balance on hand carried to August ac		26,935 48

JOS. W. ALSOP, *Receiver.*

Entry making Bartlett et al. defendants.

Afterwards, to wit, on the twelfth day of September, A. D. 1860, it being of the special and adjourned term of June of the court aforesaid for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI R. R'D CO. *et al.* } In chancery.

On motion, and it appearing to the court that Edwin Bartlett, Wm. H. Aspinwall, David Leavitt, Edward Learned, Samuel W. Comstock, and Wm. A. Booth, as trustees of an express trust, have an interest in the property involved in this suit; and that Henry Chauncey has also an interest in the same; and

that Larg. Anderson and Samuel Broadwell are trustees named in a certain mortgage upon said property; it is ordered that Bartlett, Aspinwall, Leavitt, Learned, Comstock, and Booth, and said Henry Chauncey, and also said
83 Anderson and Broadwell, be severally made parties defendants, and that they file answers within twenty days.

Jno. McLean, jr., appointed master commissioner.

And on the same day, to wit, on the twelfth day of September of the year last aforesaid, it being of the term last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI R. R'D CO. *et al.* } In chancery.

On motion to the court by complainants' counsel, John McLean, jr., is hereby appointed a master commissioner to ascertain and report to this court by the first Monday of next term as follows: First. To ascertain and report the number and amount of bonds issued and outstanding upon the several mortgages of the said company upon said railroad, its rolling stock, depot grounds, &c., and the interest, if any, due thereon up to the day of making his report, setting forth the number and amount of bonds and interest under each mortgage; also to report the payments of interest that have been made. Second. To ascertain and report the net earnings of said road for two years last past, and what disposition has been made of the same. Third. To ascertain and report what tracts of land are held by said company by lease, and for what length of time, and the amounts and times of payments of the rents thereof. Fourth. What contracts, if any, the said company has made for the hire of rolling stock in use
84 upon said road; what amount, if any, is due upon the same for the use of said rolling stock. Fifth. To ascertain and report whether the said mortgaged premises can be divided and sold in parcels or as an entirety, and in order to enable the said master to carry out and perform the duties enjoined herein, he is hereby authorized and empowered to summon witnesses and to take and procure to be taken testimony in reference to the matters to be by him examined, and this cause is continued.

Receiver's report in regard to Flint.

Afterwards, to wit, on the 29th day of September, A. D. 1860, there was filed in the office of the clerk of the court aforesaid the receiver's report in the premises, which report is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY and others. } In chancery.

The undersigned, receiver appointed in this case, represents to the court there is due to E. Flint, esq., for services rendered and as a part of current expenses between the 26th Jan'y and 20th June, 1859, over and above payments between those dates, the sum of ($1,111 17) one thousand one hundred and eleven $\frac{17}{100}$ dollars; that these services having been rendered more than sixty days previous to the entry of the order appointing the receiver, the undersigned is not authorized to pay the same without an order of the court or a judge thereof. He therefore asks for authority to pay said money.

JOS. W. ALSOP, *Receiver.*

85 Afterwards, to wit, on the 29th day of September, A. D. 1860, this cause came on to be heard before the court at chambers, whereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI R. R'D Co. *et al.* } In chancery, at chambers, Sept. 29, 1860.

On motion of the receiver, and upon filing his statement, and by consent of counsel for the company, it is ordered that the said receiver be authorized to pay E. Flint, esq., the sum of one thousand one hundred and eleven dollars and seventeen cents for services rendered between the twenty-sixth day of January and the twentieth day of June, eighteen hundred and fifty-nine, and not paid to him.

Receiver's fifth monthly report.

Afterwards, to wit, on the eleventh day of October, A. D. 1860, there was filed in the office of the clerk of the court aforesaid the receiver's 5th monthly report in the premises, which report is in the words and figures following, to wit:

Fifth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Co., for the month of August, 1860.

To balance on hand from July ac		$26,935 48
RECEIPTS.		
From express earnings of July	$1,651 78	
" passengers prior to August	7,480 58	
" freight do. do.	4,295 82	
		13,428 18
86 From passengers on ac. of August	36,298 79	
" freight do. do.	21,515 35	
		57,814 14
From mail services to June 30th		10,856 25
" other sources		10,139 92
		119,173 97
DISBURSEMENTS.		
Paid on account of first mortg. bond coupons of interest due July 1, 1858	$245 00	
Do. do. Jan'y 1, 1859	8,780 00	
Paid on ac. of interest and discount	759 11	
" " of office and other expenses	708 64	
" " charges advanced on ac's with other roads	191 99	
" " telegraph line	51 54	
" " former arrearages	371 46	
" " of current operating expenses and construction work for the month of July	57,591 04	
		68,698 78
Balance on hand carried to Sept. ac		50,475 19

JOS. W. ALSOP, *Receiver.*

Motion of D. F. Goodhue to be made def't.

87 Afterwards, to wit, on the 22d day of October, A. D. 1860, there was filed in the court here by Ward & Ramsey, sol'rs for D. F. Goodhue, his motion in the premises, which motion is in the words and figures following, to wit:

U. S. circuit court.

E. D. Morgan & Co.
vs.
The Ohio & Miss. Railroad Co. & others. } Chancery.

Daniel F. Goodhue, by Ward & Ramsey, comes and moves the court for leave to enter his appearance herein, and be made a party defendant hereto, and for leave to file answer and cross-bill in this cause for the following reasons, to wit:

1st. Because he claims to have a lien by virtue of a judgment, and levy upon certain real estate claimed to be covered the mortgages in comp. bill mentioned, which lien he can only make effectual by a court of equity.

2d. Because he claims a lien upon the premises embraced in the mortgages in the comp. bill, and a lien prior to the 3d and 4th of said mortgages.

WARD & RAMSEY,
Sol. for Goodhue.

Entry making D. F. Goodhue.

Afterwards, to wit, on the twenty-fifth day of October, A. D. 1860, it being of the October term of the court aforesaid, for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. Morgan & Co.
vs.
Ohio & Mississippi Railroad Co. } In chancery.

Answer of D. F. Goodhue.

Upon motion of Messrs. Ward & Ramsey, it is ordered that David
88 F. Goodhue be made a party defendant herein, and leave is granted said defendant to enter his appearance in this cause, and also to file his answer forthwith; and answer filed, which answer is in the words and figures following, to wit:

U. S. circuit court.

E. D. Morgan & Co.
vs.
Ohio & Mississippi Railroad Co. & others. } Chancery.

The answer of Daniel F. Goodhue to the bill of complaint of E. D. Morgan & Co.

This defendant, by leave of the court first had and obtained, now and at all times saving and reserving to himself all manner of benefit of exception or otherwise that may be taken to the errors, uncertainties and imperfections of said bill, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says:

That at the February term of the superior court of Cincinnati, within and for the county of Hamilton, in the State of Ohio, in the year 1856, on the 8th

of February aforesaid, this defendant, Daniel F. Goodhue, a citizen of the State of Ohio, at that time and now residing within the southern district of the seventh judicial circuit of the United States, by the judgment and consideration of the said superior court of Cincinnati, recovered a judgment against the defendant, the Ohio and Mississippi Railroad Company, a corporation duly incoporated by the general assembly of the State of Ohio, and also, as this defendant is informed and believes, duly incoporated by the State of Indiana and
89 Illinois respectively, for the sum of five thousand eight hundred thirty-seven dollars ninety-two cents, ($5,837 92,) with interest thereon from the 4th day of February, 1856, together with $6 83 costs of said suit in case number 3767 upon the docket of said court, all of which will more fully appear by reference to a transcript of said judgment hereto attached and made part of this answer and marked (A).

And this defendant, further answering, says that on the 30th day of March, 1857, this defendant caused a writ of fieri facias and levari facias to be issued upon said judgment from the clerk's office of said superior court of Cincinnati, to the sheriff of said Hamilton county, Ohio, which was duly levied according to law upon certain real estate in the city of Cincinnati, or near the same, in said Hamilton county, belonging to the said Ohio and Mississippi Railroad Company, which real estate so levied upon is fully described in the return of said sheriff to said writ of execution, all of which is fully shown by the record thereof hereto attached marked (B,) and made part of this answer.

This defendant further says, that said real estate so levied upon is claimed by said mortgagees, as he is informed and believes, to be a part of the property embraced in the several mortgages on the complainants' original bill, and subject to their lien and liable for their payment, and that in consequence of the
90 existence of these mortgages he has not been able to sell the property aforesaid, under his levy aforesaid, and that his judgment aforesaid remains of record entirely unsatisfied, unappealed, unreversed, and in full force and effect and is a lien upon the property aforesaid; and that by reason of said mortgages he is wholly remediless at the common law, and is, by reason of the appraisement and other laws of Ohio, entirely unable to sell said property upon said execution, and satisfy his judgment out of the proceeds of said sale.

This defendant further avers and alleges that his judgment aforesaid is a good and valid lien upon all the lands, tenements and premises set forth in said complainants' bill, and that this defendant is entitled to have said judgment, with interest and cost, paid out of the proceeds of any sale that may be made of said premises, and out of any moneys that may come into the hands of the receiver heretofore appointed in this cause, which may remain after discharging any prior liens on said premises to the lien of the defendant thereon.

This defendant further claims that the lien of the mortgages on the complainants' bill, mentioned as the 1st and 2d mortgages, are liens subsequent to and inferior to the lien of the judgment and levy of the respondent on the real estate mentioned in this answer in Exhibit B, as against his judgment and
91 levy, and do not cover and embrace said property; and this defendant further charges and avers that as to all the lands, tenements, fixtures, premises and appurtenances set forth in said complainants' bill, this defendant has a judgment lien, by virtue of his judgment hereinbefore mentioned, prior and superior to the lien of the 3d and 4th mortgages in the complainants' bill mentioned, and commonly called the mortgages to secure the "construction bonds" and the "income bonds" of said Ohio and Mississippi Railroad Company, and that as against them his judgment is the first and lien.

This defendant prays that, upon the hearing of this cause, the respective liens of the parties hereto may be marshalled, their priorities declared, an account taken, the real estate levied on by this defendant ordered to be sold, and the proceeds appropriated to the payment of his judgment, that, if necessary, the Ohio

and Mississippi railroad shall be sold, and that all this defendant's rights in the premises be protected, and for all other necessary and proper relief.

By WARD & RAMSEY,
Sol's for D. F. Goodhue.

STATE OF OHIO,
Hamilton County, ss:

Daniel F. Goodhue, the defendant (named in the foregoing answer,) makes oath and says that the matters and things set forth in said answer are true according to the best of his knowledge, information and belief.

D. F. GOODHUE.

Sworn to before me, and subscribed in my presence, by the said D. F. Goodhue, this twenty-third day of October, A. D. 1860.

JOSEPH C. SMITH,
Not. Pub. Ham. Co.

92 The exhibits referred to in foregoing answer, and made a part thereof, are in the words and figures following, to wit:

Exhibit A.

THE STATE OF OHIO,
Hamilton County, city of Cincinnati.

Superior court of Cincinnati.

Be it remembered that on the 8th day of February, A. D. 1856, in the term of February of the superior court of Cincinnati, before the honorable B. Storer, one of the judges of said court, among other things the following judgment was had and entered on the journal of said court, to wit:

DANIEL F. GOODHUE
ag't
THE OHIO & MISSISSIPPI RAILROAD COMPANY. } Money only.

This cause coming on for hearing upon the plaintiff's petition, court finds that the defendants having been duly served with process in this cause, has failed to answer or demur, and that they owe the plaintiff five thousand eight hundred and thirty-seven $\frac{92}{100}$ dollars.

It is therefore considered by the court that the plaintiff recover of the defendants his damages aforesaid, and his costs herein taxed. Judgment by default, damages $5,837 92. Interest from 4th February, '56, $ ——; costs $ ——.

THE STATE OF OHIO,
Hamilton County, city of Cincinnati, ss:

Superior court of Cincinnati.

I, Richard H. Stone, clerk of the supreme court of Cincinnati, do hereby certify the above and foregoing to be a true and correct copy of judgment entry in the case wherein Daniel F. Goodhue was plaintiff, and the Ohio and Mississippi Railroad Company was defendant, No. 3767, as the same
93 appears from the journal of said court of the February term, anno Domini one thousand eight hundred and fifty-six, page 382, and now remaining in my office.

Witness my hand and the seal of the said court at Cincinnati, this
[SEAL.] 23d day of October, A. D. 1860.

R. H. STONE, *Clerk S. C. C., H. C., O.*

Exhibit B.

Exhibit B. Jan'y 24, 1857.—No goods or chattels found whereon to levy, and by virtue of the execution hereto attached, I have this day levied upon the following described real estate, viz:

All of lots Nos. 14 and 15 in Bickhaus subdivision of lots in Storrs township, Hamilton county, Ohio, being the same premises conveyed to R. M. Bartlett by the guardian of William Bickhaus's heirs, by deed in book No. 175, page 97, of the records of Hamilton county, and by said Bartlett to Mary Johns, by deed in book 154, page 354, of the records of Hamilton county, and by said Mary Johns to the Ohio and Mississippi Railroad Company, by deed dated July 18, 1853, and recorded in deed book No. 192, page 71, of the records of said county.

Also all that lot of land No. 31, on a plat of a subdivision of a tract of about fourteen acres of ground in Storrs township, Hamilton county, Ohio, in fractional section 34, township three, (3,) and fractional range one, in the Miami purchase made by the appraisers appointed by the court of common pleas, on petition of Eliza A. Bickhaus, guardian of the heirs of William Bickhaus, deed said lot No. 31, being one hundred feet in front on the southeast side of Gordon street, as designated on said plat of subdivision, and extending back
94 southwardly between parallel lines to the Ohio river at low-water mark, on a course of south forty-six and one-half degrees east, and is five hundred and thirty (530) feet more or less on the east line, and contains one acre and twenty hundredths of an acre, being the same property conveyed to Ralph A. Douglass by Eliza A. Bickhaus, guardian of the heirs of Wm. Bickhaus, by deed recorded in book No. 129, page 135, Hamilton county records, and conveyed by said Ralph N. Douglass to Thomas Trunnell, by deed recorded in book No. 159, page 513, Hamilton county records, and by Thomas Trunnell and Mary Ann Trunnell, his wife, to the Ohio and Mississippi Railroad Company, by deed dated March 9, 1852, and recorded in deed book No. 175, page 34, of *of* the records of Hamilton county.

Also all that certain house and lot situate on the south side of Broad street, on the White Water canal, between Park and Rose street, in the city of Cincinnati, Hamilton county, and State of Ohio, being thirty-six (36) feet in front, and ninety feet in depth, and the same property conveyed to Thomas B. Smith by Payne & Fisk, by deed recorded in book No. 111, pages 208 and 209, and by said Smith to Wm. Jones, and by said Jones to E. A. Lockwood, and by said Lockwood to Joshua S. Bates, and by said Bates to Henry H. Goodman, and by said Henry H. Goodman and his wife Esther A. Goodman to the Ohio and Mississippi Railroad Company, by deed dated June 21, 1853,
95 recorded in deed book No. 189, page 334, of the records of Hamilton county.

Also all that lot of ground in the city of Cincinnati, commencing at a point on the south side of Broad street, fronting the White Water canal, and east of Park street, eighteen (18) feet in front, and ninety (90) feet deep, to a twelve-feet alley, and is the same property conveyed by Thomas B. Smith to A. Debutts, by deed recorded in the records of Hamilton county, in book 112, page 573, and by said Debutts to William Gielfus, by deed recorded in book No. 138, page 259, and by said William Gielfus to H. H. Goodman, recorded in book No. ——, page ——, of the records of Hamilton county, and by said H. H. Goodman and Esther Goodman his wife to the Ohio and Mississippi Railroad Company, by deed dated June 21, 1853, and recorded in deed book No. 189, page 334, of the records of Hamilton county.

Also all that certain lot of land situate in Hamilton county, and State of Ohio, and known and numbered as lot No. 5, and plat of subdivision of a trac

of about fourteen acres of land lying in Storrs township, Hamilton county, Ohio, made in certain proceedings in the court of common pleas, in said county, on petition of Eliza A. Backhaus, guardian, &c., of the heirs of Wm. Beckhaus, deceased, said lot No. 5 being (50) feet in front, by one hundred feet deep, and lies southwest of Bridge street, and fronts on Canal street, being one of the lots sold by Eliza A. Beckhaus, guardian, &c., to John Blakely,
96 by deed dated December 31, 1847, recorded book No. 151, page ——, records of Hamilton county, and which said lot No. 5 was conveyed by Joseph Cooper, sheriff, to John S. Nixon, by deed dated May 31, 1850, and recorded in book No. 155, page 251, of the records of Hamilton county, and conveyed to said John S. Nixon and Mary S. Nixon, his wife, to the Ohio and Mississippi Railroad Company, by deed dated July 15, 1852, and recorded in deed book No. 182, page 128, of the records of Hamilton county.

Also all that certain lot of land being part of section thirty, (30,) township four, (4,) and fractional range one, and near the city of Cincinnati, and described as follows: Beginning at the southeast corner of a lot of land conveyed by Reese E. Price and Sarah Price, his wife, to the Cincinnati, Hamilton and Dayton Railroad Company, by deed dated February 5, 1852; thence westwardly with the south line of said tract to the east line of a tract of land owned by R. M. Moore and wife, and thence southwardly with said eastern line of the Moore tract to the bern bank of the Cincinnati and White Water Canal Company thereto; thence eastwardly with said canal to the bridge across said canal, known and usually called Price's bridge; thence northwardly with the bridge which crosess said canal with said bridge to the place of beginning, containing two and a half acres more or less, being the same premises conveyed by Rees E. Price and Sarah Price, his wife, by deed dated January 25, 1853, to
97 the Ohio and Mississippi Railroad Company, and recorded in deed book No. 181, page 538, of the records of Hamilton county.

Also all the land in the following described limits: Bounded on the new turnpike road, and as now bounded and used, which said turnpike is north of the Cincinnati and White Water canal, on the east by the lands of the estate of Matthias Corks, on the south by low-water mark of the Ohio river, on the west by lands now or late of Stanley Hatch, including the ground now occupied by the Cincinnati and White Water canal, running through the premises of Brusori Purcell, and which said ground occupied by said canal as aforementioned is subject to the rights of said canal company, being part of the premises deeded to Brusori Purcell by Wm. S. Hatch, by deed dated February 11, 1846, and recorded in book No 109, page 265, of Hamilton county records, and conveyed to the Ohio and Mississippi Railroad Company by deed from Brusori Purcell and Hannah Purcell, dated February 24, 1853, and recorded on deed book No. 186, page 117, of Hamilton county records.

Also all that certain lot or piece of land lying and being in the city of Industry, Hamilton county, Ohio, being lot No. 33 on the original plat of said city as laid out by James and S. H. Gordon, and recorded in the records of Hamilton county, being thirty feet in front on Canal street, and running southwardly by same width more or less to Market street, being the same
98 premises conveyed by J. and S. H. Gordin to John McCarker, and from Nicholas Sitzler and Margaretta Sitzler, his wife, to the Ohio and Mississippi Railroad Company, by deed dated March 2, 1853, and recorded in deed book No. 185, page 351, of the records of Hamilton county.

Also all of a certain piece of land situated in the township of Delhi, Hamilton county, Ohio, being part of lot No. (5,) five, in the subdivision of lots made by D. O. Reeder, commencing at the northwest corner of said lot No. five, (5;) thence running south on Reeder street fifty feet; thence east parallel with Canal street one hundred feet; thence north fifty feet to Canal street; thence west along Canal street one hundred feet to the place of beginning, being the same

property conveyed by said Reeder to George H. Shuley, by deed recorded in book No. 115, page 315, and by said Shuley and wife to Afer Shuley his daughter, and by order of the probate court of Hamilton county, by said George H. Shuley, as guardian of his daughter Afer Shuley, to Edwin Lippencott, which last deed is dated June 21, 1853, and by the said Edwin Lippencott to the Ohio and Mississippi Railroad Company, by deed dated June 21, 1853, and recorded in deed book No. 193, page 36, of the records of the county of Hamilton.

99 Also all that certain lot of land lying and being in the township of Delhi, Hamilton county, Ohio, and being the north part of the northwest half of lot No. 9 in D. O. Reeder's subdivision of lots in Delhi township, as recorded in book No. , page , of the records of Hamilton county, being fifty feet in front and extending back one hundred and twenty-eight feet, the width in rear as in front, and is bounded on the north by Canal street, together with all the privileges and appurtenances to the same belonging, being the same property conveyed by James Southard and Margaret Southard, his wife, to the Ohio and Mississippi Railroad Company, by deed dated June 15, 1853, and recorded in book No. 187, page 590, of the records of Hamilton county. Also all the following described real estate, to wit: lot No. 24, being fifty feet in front on the Cincinnati and Whitewater canal, running back one hundred feet to an eight-feet alley; said lot being in D. O. Reeder's subdivision of lots laid out in Hamilton county, Ohio, and more particularly described as follows: commencing at a point one hundred feet west of Reeder street on the canal bank; thence running along the south line of tow-path fifty feet; thence south 18½ east one hundred feet (100) to an eight-foot alley between lot No. 14 and said described lot; thence along at right angles to the place of beginning; said lot being in township three, section four, in first fractional range of said township and northeast quarter Delhi township, Hamilton county, Ohio, and being

100 the same property conveyed by deed by Morris Symmond, Rebecca Symmond his wife, to the Ohio and Mississippi Railroad Company, and recorded in deed book No. 182, page 256, of the records of Hamilton county. Also lots No. 22 and 23 in D. O. Reeder's subdivision of lots in Delhi township, Hamilton county, Ohio, said lots being 76 feet in front on Canal, and running back one hundred feet to an eight-foot alley, being the same lots conveyed by deed to Joseph H. Hayden by D. O. Reeder, recorded in book No 159, page 428, of the records of Hamilton county, and by the said Joseph H. Hayden, by deed dated Sept. 7, 1852, to the Ohio and Mississippi Railroad Company, and recorded in deed book No. 179, page 423, of the records of Hamilton county. Also all that certain lot of land in fractional section four (4.) township three, first fractional range, in Hamilton county, Ohio, being the west half of lot No. three and the west half of lot No. 2, as Reeder's subdivision of lots as laid out and numbered on the plat recorded in book No. 119, page 398, being one hundred feet in front on Canal and Centre streets, two hundred and twenty (28) feet deep, and all right, title and interest and demand, if any, of Lysle Lodwick and wife to the ground lying between said lots and the Cincinnati and White Water canal, now known as Canal street and as the Canal Bank, being the

101 same property conveyed by deed by the said Lysle Lodwick and Mary Ann Lodwick his wife, to the Ohio and Mississippi Railroad Company, by deed dated November 24, 1852, and recorded in deed book No. 181, page 257, of the records of Hamilton county. Also all that certain lot of land in Delhi township, Hamilton county, Ohio, to wit: lot No. (1) one, in Allen S. Reeder's subdivision, and recorded in book No. 119, page 398, of Hamilton county records, being one hundred feet in front on the southerly side of the Cincinnati and White Water canal, and running back the same width in rear as front two hundred and twenty-eight (228) feet more or less, to Centre street, being the same property conveyed by deed by James Paul and Jane Paul his wife to the Ohio and Missis-

sippi Railroad Company by deed dated September 6, 1852, and recorded in deed book No. 179, page 429, of Hamilton county records.

Also all the following described parcel of land, beginning at the Ohio river below Mill creek, at the southwest corner of a tract of land purchased by Rees E. Price of the administrators of John W. Price, dec'd, and conveyed to him by said administrators by deed bearing date March 25th, 1834, recorded in the records of the county of Hamilton, Ohio, in book No. 38, page 112; thence north one hundred and ninety-one (191 and $\frac{40}{100}$) feet (forty-hundredths) to the northwest corner of said tract; thence east with a board fence fifty feet; thence south by a line drawn parallel with the first described line one hundred and ninety feet (190) more or less to the road; thence westwardly along said
102 road fifty feet more or less, to the place of beginning, being the same property conveyed by John Thomson and wife by deed dated April 13, 1850, recorded in book 135, page 15, Hamilton county records, to W. D. Matson, and by the same W. D. Matson and S. D. Matson his wife to the Ohio and Mississippi Railroad Company by deed dated February 8, 1854, and recorded in book No. 199, page 463, of the records of Hamilton county.

Also all the following described piece of land situated in Storrs township, Hamilton county, Ohio, and described as follows, to wit: commencing at a point made by the intersection of the dividing line between the lands of Wm. E. Childs and Lewis Kern, with the south river's water's edge of the Cincinnati and White Water canal at the usual stage for boating; thence along the water edge of the canal south 35° 20′ west 183 feet more or less, to the west line of the lands of said Kern; thence south 58° east along said dividing line or west line of Kern's line one hundred feet west 35° 20′ east on a line parallel to said canal one hundred and eighty-three (183) feet more or less, to the east line of lands of said Kern; thence by said east line north 58° west one hundred feet to the place of beginning; being a strip of land one hundred feet in width along the south side of the White Water canal, including the towing-path and river slope thereof, containing $\frac{42}{100}$ of an acre more or less, and is part of the premises held by
103 said Lewis Kerne from Ethan Stone, recorded in book 133, page 441, of the records of Hamilton county, and is part of the fractional section twenty-nine (29,) town. four, fractional range (1) one, of the Miami purchase, Storrs township, being the same property conveyed by deed dated March 26, 1852, from Lewis Kerne and Emeline Kerne his wife, to the Ohio and Mississippi Railroad Company, recorded in book No. 175, page 123, of the records of Hamilton county.

Also all that piece of land described as follows, viz: A part of section four, (4,) Delhi township, Hamilton county, Ohio, and lies south of the Cincinnati and White Water canal and north of a line drawn from the eastern to the western boundary of said tract fifty-five feet south of the water's edge of said canal when in good boating order, including the present towing-path, being bounded on the east by the lands of Colburn, and on the west by the lands of George Hatch, and on the north by the water's edge of the White Water canal, and on the south by a line fifty-five (55) feet from and parallel with said water's edge, for the use and purpose of the Ohio and Mississippi Railroad Company, being the same property conveyed by deed dated August 20, 1852, from Matthew McWilliams, Elizabeth McWilliams his wife, and John Henderson, by Matthew McWilliams, his attorney in fact, to the Ohio and Mississippi Railroad Company, by deed re-
104 corded in deed book No. 178, page 344, of the records of Hamilton county.

Also lots Nos. 3, 4, and 5, in Sedam and Choller's subdivision of lots in section thirty four (34) in Storrs township, Hamilton county, Ohio, said lots being each thirty feet in front on the road or street south of the White Water canal, and extending back one hundred (100) feet deep, being the same premises conveyed by Elizabeth Lamphier to Joshua D. Dickson and Daniel L. Better by deed recorded in book No. 168, page 185, Hamilton county records, and be-

ing the same property conveyed the Ohio and Mississippi Railroad Company by Joshua G. Dickson, Daniel L. Betts, Elizabeth J. L. Betts his wife, by deed recorded in deed book No. 190, page 167, of the records of Hamilton county.

Also all that piece or parcel of land situate in section 30, in the fourth town., Miami purchase, viz: the lot of ground measuring thirty (30) feet in width from east to west, and about twenty rods (20) in length more or less from north to south, and is bounded on the north by the line running between the lands of John W. Price and Sarah Price, in the partition of Evan Price's estate, and on the south by the section line, it being the east thirty (30) feet, with the exception of a small fraction near the Ohio river, of the lot of fifty-seven (57) feet front as set off to Sarah J. Bassett on the partition of Joshua W. Price's estate,
105 being in Storrs township, Hamilton county, Ohio, and being the same property deeded by John Q. A. Bassett and Sarah J. Bassett his wife, by deed August 14, 1844, to John Lauks, recorded in book No. 99, page 55, Hamilton county records, and conveyed by deed dated February 8, 1854, from W. D. Matson and S. D. Matson his wife, to the Ohio and Mississippi Railroad Company, and recorded in deed book No. 199, page 463, of the records of Hamilton county.

Also all the following described real estate, viz: Situated in Storrs township, Hamilton county, Ohio, being part of fractional section twenty-nine, being so much of the premises heretofore conveyed by John Pery, by deed to Lewis Kern, by deed recorded in deed book, No. 52, page 658, of the records of Hamilton county, as lies south of the river road, subject to all the rights of the said road, and the Cincinnati and White Water Canal Company, and subject to a deed made by said Lewis Kern and Emeline Kern his wife, to the Ohio and Mississippi railroad, for a part of said premises; the premises hereby conveyed being for the purpose of a towing-path for said canal company, and for necessary embankments, &c., of said railroad company; but no buildings are to be ever erected thereon, subject to the original lease from E. Stone, except as to rent. No ground rents to be paid by said company or their
106 assigns, but the said Lewis Kern charges the ground rent received. Said leases (the premises hereby conveyed) being one hundred and eighty-seven (187) feet along the south side of said road, and being the same premises conveyed to the Ohio and Mississippi Railroad Company by Lewis Kern and Emeline Kern his wife, by deed dated January 1, 1853, and recorded in deed book No. 182, page 441, of the records of Hamilton county.

Also lot No. 8, in Sedam & Challon's subdivision of lots as recorded in plat book No. 1, page 44, of the records of Hamilton county, and situated in section thirty-four, (34,) in Storrs township, Hamilton county, Ohio, being the same premises conveyed by Dominicus Van Dyke and Jane Van Dyke his wife, by deed to the Ohio and Mississippi Railroad Company, recorded in deed book No. 185, page 312, of the records of Hamilton county.

Also lot No. 12, in Sedam & Chollen's subdivisions of lots in Storrs township, Hamilton county, Ohio, as per plat on record in book No. , page , of the records of Hamilton county, Ohio, together with all the privileges and appurtenances to the same belonging, and all the estate, right, title, interest of the Ohio and Mississippi Railroad Company, and to every part thereof, being the same premises conveyed by deed from Coolidge and Whitstone, Wm. H. Coolidge, Mary J. Coolidge his wife, and Jacob V. Whetstone, Sophy A. Whetstone his wife, by deed to the Ohio and Mississippi Railroad Com-
107 pany, which said deed is recorded in deed book No. 180, page 431, of the records of Hamilton county.

Also all that certain tract of land, measuring twenty-seven (27) feet more or less in width from east to west, and about twenty-two (22) rods in length from north to south, and is bounded on the north by the line run between the lands

of John W. Price and Sarah Price, as said line was run on the partition of the heirs of Evan Price, and on the south by the Ohio river, it being the west twenty-seven (27) feet of a lot of fifty-seven feet (57) in width, as set off to Sarah J. Barrett, on the partition among the heirs of John W. Price, and situated in section thirty, (30,) in the fourth township of the Miami purchase, and being the same property conveyed by deed from John Q. W. Barrett and Sarah J. Barrett his wife, to George Matson, by deed dated Aug. 10, 1844, and recorded in deed book No. 96, page 145, of the records of Hamilton county, and being the same property subsequently conveyed to Edwin Purlier, by the sheriff of Hamilton county, under order of the court of common pleas in matter of partition (No. 1954) in said court between the heirs of said George Matson, and the same property conveyed by deed dated February 9, 1854, from Edwin Purlier and Sarah Purlier his wife, to the Ohio and Mississippi Railroad Company, which said deed is recorded in deed book No. 201, page 51, of the records of Hamilton county.

108 Also all the following described property, viz: Situated, lying, and being in section thirty-five, (35,) township three, (3,) fractional range one of the Miami purchase, Storrs township, Hamilton county, Ohio, and described as follows: Beginning at the centre of the culvert crossing Bold Face creek, on the river road turnpike; thence south 32° west one hundred and seventy-two feet, (172;) thence south 26° 50′ west one hundred and fifty-seven (157) feet; thence north 37° west sixty (60) feet; thence north 30° 10′ west one hundred and sixty-one (161) feet; thence north 60° 40′ west, two hundred and ten (210) feet; thence north 62° 40′ west, two hundred and seventy-three (273) feet more or less to Lysle Lodwick's line; thence north 59° east six hundred and eighty (680) feet more or less to Bold Face creek; thence south 18° 45′ east four hundred and seventy-five (475) feet more or less to the place of beginning, containing five acres and fifty-eight hundredths of an acre more or less, being the same property conveyed by deed from James C. Hall and Harriet O. Hall to the Ohio and Mississippi Railroad Company, by deed dated April 30, 1853, and recorded in deed book No. 185, page 355, of the records of Hamilton county.

Also all that certain lot of land, (No. 12,) as laid off in the subdivision of the property of the heirs of the late William Bickhaus, deceased, as subdivided and laid off and numbered, being part of fractional section thirty-four, (34,) in Storrs township, Hamilton county, Ohio, and being the same property con-

109 veyed by Timothy O'Neill, and Mary O'Neill his wife, to the Ohio and Mississippi Railroad Company, by deed dated August 24, 1852, and recorded in deed book No. 178, page 345, of the records of Hamilton county.

Also all the following described lot of land situated in Hamilton county, Ohio, being lots Nos. 13 and 22, in as designated on a plat of subdivision of about fourteen (14) acres in Storrs township, in said county of Hamilton, made under proceedings in the court of common pleas, on petition of Eliza A. Bickhaus, to sell, as guardian, and being the same property conveyed by deed from the said Eliza A. Bickhaus to John Blakely, and the same premises conveyed by John Blakely, per Benjamin Higdon, sheriff of said county, to the Ohio and Mississippi R. R. Company, by deed for lot No. 13, recorded in deed book No. 189, page 156, of the records of Hamilton county, and by deed for lot No. 22, in book No. 195, page 29, of the records of said county.

Also all that certain tract or parcel of land situated and described as follows, viz: Bounded on the south by a line parallel with, and fifty-five (55) feet from the south water's edge of the Cincinnati and White Water canal when in good boating order; on the east by land of John Bonte; on the north by the south edges of the present towing path of said canal; and on the west by the land formerly owned by Sedam, and now conveyed to Joseph

110 Symmonds and Morris Symmonds, and by them conveyed to the Ohio

and Mississippi Railroad Company for railroad purposes; also all right, title, interest, and claim in and to the present towing path of the said canal, and being the same property conveyed by deed from Lysle Lodwick and wife to Joseph Symmonds, recorded in book No. 46, page 524, and in book 47, page 419, and from D. Z. Suydam, by deed to said Symmonds, recorded in book No. 49, page 333, of the records of Hamilton county, and being the same premises conveyed by Joseph Symmonds and Celia Symmonds his wife, and Morris Symmonds and Rebecca Symmonds his wife, to the Ohio and Mississippi R'd Company, by deed recorded in deed book, ch. 179, page 641, of the records of Hamilton county.

Also the following leasehold estate, viz: All that certain tract of land situated in Storrs township, in the county of Hamilton and State of Ohio, bounded on the north by the acadamized road; on the east by the middle of Mill creek; and on the south by the Ohio river; and on the west by the lands of Robert M. Moore; which premises lie south of the Cincinnati and White Water canal, and are the same leased by Reese E. Price to the Cincinnati Iron Company, by lease dated February 5, 1849, for the term of forty years, beginning on the first day of March, 1849, which said lease is assigned, together with all the privileges and appurtenances to the same belonging, by A. McW.
111 S mple, to the Ohio and Mississippi Railroad Company, and recorded in lease book No. 9, pages 363, 445, of the records of Hamilton county. Levied on as the property of the Ohio and Mississippi Railroad Company, at the suit of Daniel F. Goodhue, and stayed by order of the plaintiff.

R. MATHERS, *Sheriff.*
U. S. BROWN, *Deputy Sheriff.*

Fees: ser., 40; levy, $4 25—$4 65.

THE STATE OF OHIO, *Hamilton County, city of Cincinnati:*

Superior court to the sheriff of the county of Hamilton, greeting:

We command you, that of the goods and chattels of the Ohio and Mississippi Railroad Company, defendant, in your county, you cause to be made five thousand eight hundred and forty-three dollars and forty-five cents, which Daniel F. Goodhue, plaintiff, lately, to wit, at the term of February, A. D. 1856, in our superior court of Cincinnati, recovered against said company, as well for his damages assessed as for his costs and charges by him about his action in that behalf expended, whereof the said defendant is convicted, as appears to us of record, if so much goods and chattels of the said defendant can be found in your county; if not, then that you cause the same to be made of the lands and tenements of the said defendant lying in your county; and make due return of this execution to our said court within sixty days from the date hereof.

112 [SEAL.] Witness my hand, and the seal of the said court, at Cincinnati, this 19th day of January, A. D. 1857.

THOS. SPOONER,
Clerk of the Superior Court of Cincinnati.
By E. P. CRANCH, *Deputy.*

MARCH 20, 1857.

Levy made upon real estate, and execution stayed by order of plaintiff. Sh'ff fee, $4 65.

R. MATHERS, *Sh'ff.*
By R. F. ADAMS, *Deputy.*

Superior court of Cincinnati.

THE STATE OF OHIO, *Hamilton County, city of Cincinnati, ss:*

I, Richard H. Stone, clerk of the superior court of Cincinnati, do hereby certify the above to be a true and correct copy of the execution issued in the cause

wherein Daniel F. Goodhue was plaintiff, and the Ohio and Mississippi Railroad Company was defendant, and also the return and levy made by the sheriff of Hamilton county, Ohio, to whom it was directed, as the same appears from the original now on file and remaining in my office.

[SEAL.] Witness my hand, and the seal of the said court, at Cincinnati, this 23d day of October, A. D. 1860.

R. H. STONE, *Clerk S. C. C., H. C., O.*

Receiver's report.

Afterwards, to wit, on the 30th day of October, A. D. 1860, the receiver, Jos. W. Alsop, filed his sixth monthly report in the premises, which report is in the words and figures following, to wit:

Sixth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for September, 1860.

Balance on hand from August account			$50,475 19
RECEIPTS.			
113 From express freight earnings of Aug't	$1,715 30		
" passenger earnings prior to Sept'br	15,674 44		
From freight ... do ...	11,690 84		
		29,080 58	
" passenger earnings on acc't of Sept'br	45,872 51		
" freight ... do ...	23,162 92		
		69,035 43	
" other sources		1,277 11	
			149,868 31
DISBURSEMENTS.			
Paid on acc't of operating expenses in September	9,400 10		
" charges advanced in account with other roads	1,160 10		
" interest and discount	743 86		
" office and other expenses	589 74		
" advances by receiver on former months to meet payments	15,000 00		
" on account of first mortgage coupons, due Jan'y 1, 1860	770 00		
" on account of first mortgage coupons, due July 1, 1860	11,935 00		
" on account of former arrearages	175 09		
" on account of current expenses and construction work for August	73,470 42		
		113,244 37	
Balance on hand carried to October ac			36,623 94

JOS. W. ALSOP, *Receiver.*

Entry ordering comm'r's report to be filed.

114 Afterwards, to wit, on the 12th day of November, A. D. 1860, it being of the October term of the court aforesaid, for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & CO.
vs.
THE OHIO AND MISSISSIPPI RAILROAD CO. *et al.* } Chancery.

This day came the master commissioner appointed in this cause and presented his report, which the court ordered to be filed herein. The report of the master commissioner, referred to in the foregoing entry, is in the words and figures following, to wit:

Master commissioner's report.

The undersigned, special master commissioner, to whom certain matters in this cause were referred, by an order made at the June term of this court, A. D. 1860, now submits upon the same the following report:

Upon the first point, namely, "to ascertain and report the number and amount of bonds issued and outstanding upon the several mortgages of said company upon said railroad, its rolling stock, depot, grounds, and the interest, if any, due thereon, up to the day of making his report, setting forth the number and amount of bonds and interest under each mortgage; also, to report the payments of interest that have been made;" the master has taken the testimony of Samuel Trevor, the secretary of the Ohio and Mississippi Rail-
115 road Company, which shows, with great accuracy, the facts in regard to the first point to be as follows:

1st. First mortgage bonds, two thousand and fifty (2,050) bonds of one thousand ($1,000) dollars each, dated May 24, 1852, and payable in city of New York July 1, 1872.

Interest due and unpaid on same.	Interest.	Principal.
To November 1, 1860	$220,733 33	$2,050,000 00
Second mortgage bonds, two hundred and fifty-eight (258) bonds of $1,000 each, dated Dec. 1, 1853, and payable in New York city Oct. 1, 1880		258,000 00
Interest due on same to Nov. 1, 1860, as per statement B	91,805 00	
Third mortgage bonds, four (4) bonds of $1,000 each, dated April 27, 1855, and payable in city of New York, June 1, 1875		4,000 00
Interest due on same to Nov. 1, 1860, as per statement C	1,516 67	
Construction bonds, forty-five hundred and seventeen (4,517) bonds (3,967) of $1,000 each, and 550 of $500 each, dated March, 1856, and payable in city of New York March 1, 1876		4,242,000 00
Interest due on same Nov. 1, 1860, as per statement D	929,722 50	
Income bonds, thirty-six hundred and forty (3,640) bonds, dated May 1, 1856, and
116 payable in New York May 1, 1881, viz., 3,000 of $1,000 each, and 640 of $500 each		3,320,000 00
		9,874,000 00
Interest due on same to Nov. 1, 1860, as per statement E	695,065 00	
		1,938,842 50
Making total bonded debt and interest		11,812,842 50

Payments of interest.

Upon the payments of interest that have been made, the master reports as follows:

On first mortgage bonds (as per statement A) there appear to have been payments of interest in part, at intervals dating from July 1, 1858, to Nov. 1, 1860, inclusive, amounting in all to the sum of $185,850, leaving a balance of interest due Nov. 1, 1860, of $220,733 33.

Construction bonds.

By reference to statement "D," appended hereto, it will be seen that there has been a payment of interest by the company, upon construction bonds, of $10,587 50, leaving a balance of interest due Nov. 1, 1860, $929,722 50.

Income bonds.

Upon income bonds there has been (as per statement "E") a payment of interest by the company amounting to $2.135, leaving a balance of interest due on Nov. 1, 1860, amounting to $695,065.

Recapitulation.

Interest on $2,050,000 first mort. bonds			$406,583 33
Payment of int.	$185,850 00		
" $258,000 second mort. bonds			91,805 00
117 " 4,000 third mort. bonds			1,516 67
" $4,242,000 construction bonds			940,310 00
Payment of int.	10,587 50		
" $3,320,000 income bonds			697,200 00
			2,137 415 00
Int. payment	2,135 00		
Total payment of interest			198,572 50
Total balance of interest due Nov. 1, 1860			1,938,842 50

Upon the second point, namely, to ascertain and report the net earnings of said railroad for two years last past, and what disposition has been made of the same, the master reports upon this point as follows:

Net earnings for the fiscal year ending April 30, 1859	$267,524 97
" " " " " " April 30, 1860	290,547 37
Total net earnings for two past years	558,072 34
I find that the whole of the above amount, together with "receipts from other sources," the particulars of which are found in Exhibit No. 4¼ hereto attached, and which are net earnings, amounting to the (1858–'59) sum of	52,068 03
1859–'60 "	126,852 35
Making total amount, with net earnings, of	736,992 72

has been expended for the use of the company, as set forth in the particulars of Exhibit No. 4 attached to this report.

Upon the third point, namely, to ascertain and report what tracts of land are held by said company by lease, and for what length of time, and the amounts

and times of payments of the rents thereof, the testimony taken by the
118 master shows as follows:

There are sundry tracts or parcels of land held by said Ohio and Mississippi Railroad Company by lease, and for various lengths of time, from seven to ninety-nine years; the total amount of payments for lease of said property are ten thousand nine hundred and eighty-seven $\frac{50}{100}$ dollars ($10,987 50,) the times of payment for which vary, being quarterly, semi-annually, and annually; all the particulars of which are fully set forth in Exhibit marked A, and attached hereto.

Rolling stock.

Fourth. What contracts, if any, said company has made for hire of rolling stock in use upon said road; and what amount, if any, is due upon the same for use of said rolling stock. Upon this point the master reports as follows:

The Ohio and Mississippi Railroad Company has a contract with William H. Aspinwall and his associates, by which they have on hire from said parties, fourteen locomotives, two passenger cars, three express cars, one baggage car, and one hundred and eighty-five freight cars, the whole of which are valued at $226,100, on which sum the company pays interest for the hire of said rolling stock at the rate of ten per cent. per annum, and also pays ten per cent. additional for depreciation in value of said rolling stock by the use thereof.
119 There will be due to the said William H. Aspinwall & Co., on account thereof, to the 1st of Nov., 1860, the sum of $122,488 89, which amount includes both the ten per cent. for interest and the ten per cent. for use. The amount allowed for depreciation in value by use to be deducted from the value of said rolling stock, whenever the said company shall purchase it.

In regard to the fifth point—to ascertain and report whether the said mortgaged premises can be divided and sold in parcels or as an entirety—the master reports:

That he has taken the testimony of George B. McClellan, the railway manager of the Ohio and Mississippi railroad, whose evidence, by reason of his large experience in operating this and other roads, is entitled to great weight, and also from other sources has become satisfied, and so reports, that any separation of said mortgaged premises into two or more parts, with a view of selling the same, would be very disastrous to all the parties interested therein. Unity of action is one essential to the success of undertakings of this nature, and magnitude—eminently so in the present case; destroy this element of prosperity, and you strike at the very root of success. The experience of the past has demonstrated that any separation of the different divisions of a road is injurious to the sections so divided, and also to the whole line. (See Exhibit No.
120 6.) The master therefore reports that any division of the said mortgaged premises into parcels would at present be injudicious, and the interests of all parties would be to have the said premises sold as an entirety.

All of which is respectfully submitted.

JNO. McLEAN, JR., *Special Master.*

Depositions of witnesses taken before me, in pursuance of an order of court heretofore referred, and upon which I have based my report.

Samuel Trevor, of lawful age, of the county of Hamilton and State of Ohio, personally appeared before me, at the office of the clerk of the circuit court of the United States, within and for the seventh circuit and southern district of Ohio, on the 3d day of November, A. D. 1860, and being first duly affirmed by me, as hereafter certified, deposes as follows:

Question 1 by complainants. Please state your name, residence and occupation.

Answer. My name is Samuel Trevor; residence, Cincinnati; at present am secretary of the Ohio and Mississippi Railroad Company, and have been so most of the time since October, 1855.

Question 2. Have you lately made an examination of the financial condition of the Ohio and Mississippi Railroad Company?

Answer. I have done so.

121 Question 3. Please state the amount of the bonded debt of the company, specifying the separate amount of each class of bonds.

Answer. For answer to this question, I refer to an exhibit attached hereto and marked No. 1, which was carefully prepared by me and is correct. This statement shows the whole amount of the bonded debt to be as follows:

Principal	$9,874,000 00
Interest due and unpaid to Nov. 1, 1860	1,938,842 50
Making a total bonded debt of	11,812,842 50

Question 4. Will you please specify the amount of interest which will be due and unpaid Nov. 1, 1860, upon each separate class of bonds?

Answer. The answer to this question will be found in exhibit No. 2, hereto attached, which has been carefully prepared by me. This paper shows the amount due on the first mortgage bond to Nov. 1, 1860, to be.. $220,733 23

On second mortgage bonds	91,805 00
On third ....do....do	1,516 67
On construction do....do	929,722 50
On income ....do....do	695,065 00
Total amount	1,938,842 50

The interest here named is the interest as it accrued, and not interest upon the interest in default.

Question 5. Please state the total amount of the indebtedness of the Ohio and Mississippi Railroad Company, other than the bonded debt.

Answer. The answer to this will be found in exhibit No. 3, attached hereto, and which has been carefully prepared by me.

122 Question 6. Please state, if you can, the amount of the net earnings of the Ohio and Mississippi Railroad Company for the past two years.

Answer. The net earnings will be found in the exhibit hereto attached, and marked No. 4.

This paper shows the net earnings and receipts from other sources, and the disbursements of those amounts for the two past years.

Since making the above answer, I have examined the books to ascertain the items of "receipts from other sources," and find them to be as exhibited in the paper hereto attached, numbered 4¼. This paper shows that these items are no part of the net earnings of the years 1858–9 and 1859–60, referred to above.

Question 7. State if the company derives any income from any other source than the earnings of its road proper.

Answer. I know of none except some small amount from rents, but the amount is but trifling.

Since making the above answer I have made a more particular examination of the books, and the paper attached, numbered 4½, contains the correct amount.

Question 8. Does the company own any leasehold property? If so, please state the amount of the rents to be paid by the company, and describe the property so leased.

Answer. The answer to this will be found in statement hereto at-
123 tached and marked A, the total amount being $10,987 50.

Question 9. Is there any portion of the rolling stock used in working the road which is paid by the company? If so, please state, if you can, of whom and at what price the said rolling stock is rented.

Answer. The answer to this will be found in a paper hereto attached and marked No. 5.

SAMUEL TREVOR.

No. 1.—Statement of bonds issued by the Ohio and Mississippi Railroad Company, and outstanding Nov. 1, 1860.

1. Two thousand and fifty (2,050) first mortgage bonds of $1,000 ea., dated May 24, 1852, and payable in the city of New York July 1, 1872		$2,050,000 00
Interest due on same to Nov. 1, 1860, as per statement A	$220,733 33	
2. Two hundred and fifty-eight (258) second mortgage bonds of $1,000 ea., dated Dec. 1, 1853, and payable in the city of New York Oct. 1, 1880		258,000 00
Interest due on same to Nov. 1, 1860, as per statement B	91,805 00	
3. Four (4) third mortgage bonds of $1,000 ea., dated April 27, 1855, and payable in the city of New York June 1, 1875		4,000 00
Interest due on same to Nov. 1, 1860, as per statement C	1,516 67	
124 4. Forty-five hundred and seventeen (4,517) construction bonds, (3,967 of $1,000 ea. and 550 of $500 ea.,). dated March 1, 1856, and payable in the city of New York March 1, 1876		4,242,000 00
Interest due on same to Nov. 1, 1860, as per statement D	929,722 50	
5. Thirty-six hundred and forty (3,640) income bonds, dated May 1, 1856, and payable in New York May 1, 1881, (viz: 3,000 $1,000 ea., and 640 of $500 ea.)		3,320,000 00
		9,874,000 00
Interest due on same to Nov. 1, 1860, as per statement E	695,065 00	
		1,938,842 50
Total bonded debt and interest		11,812,842 50

EXHIBIT No. 4.

Statement of net earnings of the Ohio and Mississippi Railroad Company, for the past two years, viz:

1. For the fiscal year ending April 30, 1859 $267,524 97

Which have been disbursed, (including receipts from other sources,) as follows:

On account of construction work, and arrearages for 1857–8 and 1858–9			$131,092 31
" of new cars			3,681 15
" of fuel and materials, &c.			43,419 21
" of office rent and ground rents			9,670 86
" of taxes			9,168 31
" of expenses and salaries of officers in Cincinnati and New York			14,739 37
125 " of old floating debt			8,665 95
" of interest and discounts			10,157 67
" of real estate			100 00
" of rolling stock due to W. H. Aspinwall and associates			5,184 19
			235,879 62
Amount of earnings uncollected	$80,966 84		
Cash balance on hand	2,746 54		
			83,713 38
Total			319,593 00
Viz: Net earnings as above	267,524 97		
Receipts from other sources	52,068 03		
	319,593 00		
2. For the fiscal year ending April 30, 1860			$290,547 37
Disbursed, (including receipts from other sources,) as follows:			
On account of construction work, 1859–60			91,320 83
" of new cars			14,375 00
" of fuel and materials, &c			16,070 51
" of office rent and ground rents			14,548 36
" of taxes			10,556 06
" of expenses and salaries of officers in Cincinnati and New York			6,796 05
" old floating debt			10,535 36
" of interest and discounts			8,355 05
" of coupons of interest			107,905 00
" of notes out May 1, 1859			22,767 01
126 Paid on account of open accounts do			95,632 35
" " of real estate			300 00
Paid on account of capitalization expenses			2,628 71
This last amount to be cancelled by a surrender of coupons of interest by the trustees.			
			401,790 29
Amount of earnings uncollected	$58,862 58		
Cash balance on hand	28,722 06		
	87,584 64		
Less pay-rolls and bills unsettled to April 30, 1860	71,975 21		
			15,609 43
Total			417,399 72
Viz: Net earnings as above	290,547 37		
Receipts from other sources	126,852 35		
	417,399 72		

Leasehold property.

The Ohio and Mississippi Railroad Company holds several parcels and lots of land by lease, on which the annual rents amount to the sum of $10,987 50
As per statement A.

No. 5.—Statement of rolling stock which the Ohio and Mississippi Railroad Company have on hire, and the amount paid for the use of the same.

127 The company has on hire from Wm. H. Aspinwall and his associates fourteen locomotives, two passenger cars, three express cars, one baggage car, one hundred and eighty-five freight cars; the whole of which are valued at $226,100.

On which sum the company pays interest for the hire of said rolling stock at the rate of ten per cent. per annum, and ten per cent. additional for depreciation in value by the use thereof.

There will be due to the said W. H. Aspinwall and associates, on account thereof, to the 1st of November, 1860, the sum of $122,488 89.

Which amount includes both the ten per cent. for interest and the ten per cent. for use. The amount allowed for depreciation to be deducted from the value of said rolling stock whenever the company shall purchase it.

No. 2.—Statement of interest due on mortgage bonds to November 1, 1860

A.

First mortgage—$2,050,000.

Six months' interest due July 1, 1855.....	$71,750	
Less amount paid by the company.....	32,410	
		$39,340 00
Six months' interest due Jan. 1, 1859.....	71,750	
128 Less paid by the company.....	31,780	
		39,970 00
Six months' interest due July 1, 1859.....	71,750	
Less paid by the company.....	31,920	
		39,830 00
Six months' interest due Jan. 1, 1860	71,750	
Less paid by the company.....	66,395	
		5,355 00
Six months' interest due July 1, 1860.....	71,750	
Less paid by the company.....	23,345	
		48,405 00
		172,900 00
1860, Oct. 15.—Should the company pay anything on act. of July 1, 1860, prior to Nov. 1, 1860, it is to be deducted.		
Four months' interest to November 1, 1860.....		47,833 33
		220,733 33

Second mortgage—$258,000.

Five years' interest due to Oct. 1, 1860.....	$90,300	
One month's interest due to Nov. 1, 1860	1,505	
		$91,805 00

Third mortgage—$4,000.

Six	months'	interest	due	Dec. 1, 1855	$140 00
Six	"	"	"	June 1, 1856	140 00
Six	"	"	"	Dec. 1, 1856	140 00
Six	"	"	"	June 1, 1857	140 00
Six	"	"	"	Dec. 1, 1857	140 00
Six	"	"	"	June 1, 1858	140 00
Six	"	"	"	Dec. 1, 1858	140 00
Six	"	"	"	ea., June and Dec. 1, 1859	280 00
Six	"	"	"	June 1, 1860	140 00
Five	"	"	"	Nov. 1, 1860	116 67
					1,516 67

129

D.

Construction bonds—$4,242,000.

Six months' interest due March 1, 1858	$148,470 00	
Less paid by the company	10,587 50	
		$137,882 50
Six months' interest due Sept. 1, 1858		148,470 00
Six months' interest due March 1, 1859		148,470 00
Six months' interest due Sept. 1, 1859		148,470 00
Six months' interest due March 1, 1860		148,470 00
Six months' interest due Sept. 1, 1860		148,470 00
Two months' interest to Nov. 1, 1860		49,490 00
		929,722 50

E.

Income bonds—$3,320,000.

Six months' interest due May 1, 1858	$116,200	
Less paid by company	2,135	
		$114,065
Six months' interest due Nov. 1, 1858		116,200
Six months' interest due May 1, 1859		116,200
Six months' interest due Nov. 1, 1859		116,200
Six months' interest due May 1, 1860		116,200
Six months' interest due Nov. 1, 1860		116,200
		695,065

Recapitulation.

Interest on	$2,050,000	—first	mortgage	bonds	$220,733 33
" "	258,000	—second	"	"	91,805 00
" "	4,000	—third	"	"	1,516 67
" "	4,242,000	—construction	"	"	929,722 50
" "	3,320,000	—income	"	"	695,065 00
Total					1,938,842 50

SAM. TREVOR,
Secretary O. & M. R. R. Co.

CINCINNATI, *Oct.* 15, 1860.

130 *No. 3.—Amount of indebtedness of the Ohio and Mississippi Railroad Company, outside of the bonded debt.*

1. Loan from the city of Cincinnati	$600,000
2. Notes of the company held by Wm. H. Aspinwall and associates, for completing the road	360,000
Interest on said notes, from Sept. 1, 1858, to Nov. 1, 1860	46,800
3. Old floating debt—about	137,000
4. Pay-rolls and supply bills for Oct., 1860, about	75,000
	1,218,800

No. 4¼.—The "receipts from other sources" are as follows:

For 1858–9:	
Balance of cash on hand May 1, 1858	$8,759 70
Revenue due May 1, 1858, since collected	43,147 89
Amount received for rent, (wharfage)	160 44
Total	52,068 03
For 1859–60:	
Balance of cash on hand May 1, 1859	$2,746 54
Revenue due May 1, 1859, since collected	80,966 84
Amount received on open account	28,138 97
Temporary loan by company	15,000 00
Total	126,852 35

131 *Income of the Ohio and Miss'i Railroad Company from other sources than the earnings of the road.*

Annual rent of 3 lots of land, at $200 ea	$600
Do. 1 do	250
This rent ends Feb'y 9, 1861.	
Do. of 2 lots	216
Continuance uncertain.	
Do. of river landings, about	250
Continuance uncertain.	
Do. of saloon at Seymour	300
Total	1,616

	From whom leased.	Description of property.	Date of lease.	Time.	Ann'l rent.	How payable.
A.....	Wm. M. Shires to Ohio & Miss'i R. R. Co.	Lots No. 42, 43, 44, 45, 46, 47, 48, 49, and fifteen feet of the E. side of No. 41, in the city of Cincinnati, as they are numbered on the plat of subdivision made by Yeatman & Anderson, and recorded in book 39, p. 554, of the Hamilton county land records. Said lot beginning at the SW. corner of Mill and Front streets, and extending 220 feet along the S. of Front str't to H. Hanna's line.	April 14, 1853....	99 y'rs, rentable forever....	1,800 00	Semi-annually.
B.....	Henry Hama to same.....	Lots No. 1 and 2, in the city of Cincinnati, E. of Wood st., on a plat of subdivision made of Culbertson Park, and recorded in book 22, p. 5, of the above named record; and lot No. 40, and ten feet of the west side of 41, on Yeatman & Anderson's plat of subdivision, recorded in book 39, page 554, as above.	April 14, 1853....	99 years, &c.....	1,650 00	"
C.....	William Orange to same ...	A lot of land in the city of Cincinnati, on the S. side of Front street, near the 5th str't landing, being 81 feet front on the S. side of Front street, from a point 200 feet eastwardly from the intersection of 5th street and Front, being the premises conveyed by George Graham to s'd Orange by deed dated August 20th, 1832.	Sept'br 1, 1853...	99 years, &c.....	800 00	Quarter yearly.
D.....	Margaret Howard, guardian, &c., to same.	Lot No. 1, in the city of Cincinnati, on the plat of subdivision made by Ramsey & Wade, recorded in book 73, page 382, of the Ham'n co. land records, bounded W. by Harriet str't, N. by Front st., E. by the east line of said subdivision, and S. by the Ohio river, being 200 feet front on Front street, east'y from Harriet str't.	May 2d, 1853.....	10 years..... 5 "	..... 400 00	Quarter yearly. Present rate.
	H. L. Sproat and wife to James C. Hall and Jno. S. G. Burt.	Part of lot No. 21, in the city of Cincinnati, in Ludlow's subdivision, said part being on the south side of Front st., marked A, and containing 127 ft. on said Front str't, on the subdivided plat of said lot No. 21. Also part of said lot No. 21, marked B, and containing 127 ft. on said Front st. above. Also part of said lot No. 21, marked C, and containing 127 ft. on Front str't and on Sixth str'ts, as above. James C. Hall, by deed dated March 5, 1855, and J. S. G. Burt, by deed dated same date, convey to the Ohio and Miss. R. R. Co. the above 3 part of lot No. 21; said company assuming to perform all the conditions and stipulations contained in said leases to be performed by said Hall & Burt.	Jan'y 2, 1854..... Jan'y 2, 1854..... Jan'y 2, 1854..... Rlb. for 10 yr's at $420.	10 years..... Ren'ble for 10 y'rs at $315. 10 years..... Ren'ble for 10 years a $315. "	286 66 286 66 " 376 66	Semi-annually, in advance. Do. " Do.
F.....	Nicholas Longworth to Ohio and Miss'i R. R. Co.	A lot 127 feet front on the S. side of Front str't, in the city of Cincinnati, and running the same width to the Ohio river; bounded E. by premises of Sheepshanks, W. by premises leased by Longworth to C. Bradley.	May 10, 1853.....	14 years.....	732 15	Semi-annually.

		Also a lot on the S. side of Front str't, lying further west in the city, 127 ft. front, running back to the river; bounded E. by premises bought by Longworth of the heirs of J. Gardener, and west by premises owned by Allen's heirs.	May 10, 1853.....	14 years.....	732 15	Semi-annually.
G.....	Same to C. Bradley, and Bradley to Robt. Boal, and Boal to O. & M. R. R. Co.	A lot of land in the city of Cincinnati, on the S. side of Front str't, west of Carr str't; beginning at the NW. corner of a lot bought by said Bradley from John Brown; thence westwardly 75 feet, M. C., to the NW. corner of said Longworth's lot, and back on the lines of the lot to the Ohio river.	Feb'y 20, 1846....	Forever to 47 " 48 " 51 " 56 " 61 " 66 " forever.	.... 168 75 "	Semi-annually. Present rate.
H. D..	Same, and D. H. Horne, to D. Mulford.	A lot of land in the city of Cincinnati, beginning on the S. side of W. Front str't, at the NE. corner of a tract of land leased by Longworth & Horne to Jethro Mitchell and others; thence east'y on the S. side of W. Front str't to the E. line of lot No. 29, in Ludlow's subdivision, about 176 ft.; thence south'y on said E. line to low-water mark, &c.	March 1, 1850....	99 y'rs, ren'ble forever..... 1853 " 56 " 59 " 63 " 70 " 83 " forever.	.... 440 00	Semi-annually. Present rate.
I. E..	Same to James Ahens, ½ Jethro Mitchell and Jas. Dunlap. ½	A lot of land in Cincinnati, commencing at a stake in the S. line of W. Front st., at the NE. corner of a tract of land leased by said Longworth & Horne to James Ahens; thence E'y on the S. side of W. Front st. 200 feet; thence S'y at right angles with W. Front st. to low-water mark, &c.	"	13 years to 49 52 55 58 61	.... 500 00	Semi-annually. Present rate.
K. F...	Same to James Akers.....	A lot of land in Cincinnati, commencing at a stake in the S. line of W. Front st., 300 feet from the intersection of said str. with the E. line of land owned by Jno. Keiser; thence W'y along the S. line of W. Front st. 300 feet to a stake in Keiser's E. line;	March 21, 1849...	99 y'rs, from Sept. 3, '47, ren'ble forever. 49 52 to 55 " 58	.....	Semi-annually.
L. F. 2		thence S. 16½° E. along said Keiser's E. line 61 ft. 11 in. to a stone; thence S. 80½° W. along Keiser's S. line about 200 ft. to a point in the centre of Mill creek to low-water mark in the Ohio river, &c.	300 ft	To 87, $1,200. " 61 " 97, 1,500. " 67 Forever 1,800. " 77 " 49	600 00	Present rate.
			200 ft	" 87, 400 00. " 52 " 55 " 97, 500 00. " 58 Forever, 600 00. " 61 " 67	.....	Present rate.
	Rees E. Price to Cin'l Iron Company, and by A. McN. Semple, trustee of said company, to the Ohio and Miss'i R. R. Co.	A lot of land in Storrs township, south of the Cin. and W. Water canal, bounded N. by the McAdamized road, E. by the middle of Mill creek, S. by the Ohio river, and W. by land of Robert M. Moore.	Feb'y 8, 1849.....	40 years.....	1,050 00	Semi-annually.
	James H. Price to O. & M. R. R. Co.	Part of lot No. 30, section 30, in Storrs township, formerly set off to Clarissa Price in the partition among the heirs of J. W. Price, dec'd, bounded N. about 125 ft. by the centre of the river road, E. by the E. line of lot No. 3 and the W. line of a lot now owned by R. E. Price; S. by the southerly line of lot No. 3; W. by a lot owned by Jonathan Staebler.	Feb'y 21, 1854....	14 years.....	500 00	Annually in advance.

Statement A.—Continued.

From whom leased.	Description of property.	Date of lease.	Time.	Ann'l rent.	How payable.
	Also part of lot No. 7, in section 30, as above set off, as above, to Clarissa Price, fronting on the Court alley about 100 feet, bounded S. by the N. line of said alley, E. by a lot owned by E. Jackson, N. by the W. W. canal, W. by the W. line of lot No. 7, &c.				
Charles Adam to O. and M. R. R. Co.	Assignment of lease from Jona. Staebler to Chas. Adams and Jno. Denny, and by Denny of his interest to said Adam, for a lot in Storrs township, on the bank of the Ohio river, below Mill creek and south of the road; beginning in the centre of the road at W. Matson's line; thence S. along Matson's line to the section line; thence E. at right angles 25 ft., M. L., to land of Jas. H. Rice; thence N. along Rice's line to the centre of the road.	M'ch 22, 1855	15 y'rs from July 22, '48	25 00	Quarter yearly.
Jonathan Staebler to O. & M. R. R. Co.	A tract of land in Storrs township fronting about 75 ft. on the N. side of the River road, and about 5¼ chains deep, being part of the land conveyed to said Staebler by David Franty and wife, by deed recorded in book 100, p. 81.	July 14, 1854.....	7 y'rs to Sep. '56 ..... to Sept. '61	..... 420 00	Semi-annually. Present rate.
Same to same	Lot of land in Storrs, 25 ft	Oct. 25, 1857.....	.....	140 00	Semi-annually.
Ethan Stone to David Barkdol, and transfer, and through several others, to C. Castillo, who deeds it to O. and M. R. R. Co., subject to terms of Stone's lease.	Part of fractional section No. 29, a little below the mouth of Mill creek, in Delhi township, beginning at the N. side of the highway leading to Cin'i, on the bank of the Ohio river, 140 E. of E. D. Crane's E. line; thence E'y on the N. side of said highway to where said highway crosses the N. line of said fractional; thence W'y to John Stout's E. line; thence S'y on said Stout's E. line to beginning.	May 21, 1831.....	99 y'rs, R. forever	36 00	Quarter yearly.
Ethan Stone to Joseph Craig, & transfer through several others to Lewis Ballauf, and by him to O. and M. R. R. Co.	Part of fractional section No. 29, in Delhi tp., bounded W. by property leased to A. H. Lemon; N. by the N. line of said fraction; E. by the E. side of the Bark house and dwelling on said premises, and S. by the Ohio river.	.....	99 yrs. R. forever.....	50 00	Quarter yearly.
Ethan Stone to Adam H. Lemon. Same to C. H. Kellog and others. The property described in the above two leases is deeded to the O. and M. R. R. Co., by W. Reson and wife, subject to said leases.	Lot of land in Storrs t'p, bounded on the S. by the river road from Cincinnati to North Bend; on the W. by the road to Greene t'p; on the N. by the section line, and on the E. by a line at right angles with the river road, as per lease recorded in book 88, p. 465, Hamilton co. land records. Also a lot of land adjacent to the above, beginning at a point on the N. side of the Ohio at low-water mark where the W. line of the above described lot leased to A. H. Lemon continued would intersect the Ohio river; thence N. along said W. line to the S. side of the road leading down to the river; thence E. along the S. side of said road 154 ft.; thence	July 1, 1829.....	99 yr. R. forever.....	100 00	Quarterly.

	S. parallel with said W. line to the Ohio river at low-water mark; thence down the river to the place of beginning.				
Storrs Township to W. O. Barr. The Sheriff of Hamilton co. to Robert M. Moore, and Moore to O. and M. R. R. Co.	A tract of land in Storrs township, commencing at a point in the centre of the River road in a line with the W. line of the bridge over the Cin. and W. W. canal opposite Schleigh's tavern; thence W'y with the centre of the River road 500 ft.; thence S'y at right angles with said road to the Ohio river; thence along the river E'y 500 ft.; thence in a straight line to the place of beginning.	Oct. 15, 1848	15 years	150 00	Quarterly.
Humphrey Brown and wf. to O. and M. R. R. Co.	A strip of land in sec. 10, Delhi township, on the N. side of the Cincinnati and W. W. canal, where said canal passes through the lands set off and apparted to said Brown and wife, in right of his wife, as one of the heirs of E. Anderson, deceased, being about 2.52 chains in 167 ft. in length and 10 ft. in width.	Jan'y 4, 1854	Indefinite	50 00	Quarterly.
Edwd. Hazard and wife to same.	A strip of land as above, in sec. 10, Delhi tp., set off as above to s'd Hazard and wife, in right of his wife, being 299 chains, or 197 3-12 ft. in length and 10 feet in width.	Jan'y 4, 1854	Indefinite	50 00	Quarterly.
Nath'l Williams				50 00	
Jnoa. J. Stuebler				25 62	
Cin. and White Water Canal Co.				50 00	
Alex'r Ingraham				50 00	
	Total			$10,987 50	

133 No. 6.

Also George B. McClellan, of Cincinnati, county of Hamilton, and State of Ohio, of lawful age, being first duly sworn by me as hereafter certified, deposes as follows:

Question 1. Please state your name and occupation.

Answer. George B. McClellan, railway manager of the Ohio and Mississippi railroad.

Question 2. Please state the extent of your experience as a railway manager, and what has been heretofore your occupation?

Answer. My original occupation was that of a military engineer, having served about 8 years as an officer of the U. S. corps of engineers, and during that period I was in command of one of the parties engaged in the exploration of the route for a Pacific railway. For nearly four years past I have been engaged as a railway engineer and manager; about three and a half years of that time I was the chief engineer and vice-president of the Illinois central railroad, having the management of the affairs of that company in Illinois.

Question 3. Since you have been acting as railway manager of the Ohio and Mississippi railroad, what have been your opportunities of becoming familiar with the road both in regard to its construction and its business?

Answer. Having the general control of the business of the entire line between Cincinnati and St. Louis, and the direct management of all the business, both general and detailed, of the eastern division, I have frequently passed on
134 the road, have made detailed examination of the eastern division, and am every day called upon to decide questions affecting both the local and foreign business of the road, and am entirely familiar with the whole business of the road.

Question 4. Please state, in view of your knowledge of the road, whether a sale of the road in separate divisions would be beneficial or injurious to those parties who own it; I refer simply to the eastern division.

Answer. A separation of the eastern division into two or more parts would be disastrous in the extreme to all parties interested. Such a division would greatly increase the expense of operating the road, and would injure its business and destroy that unity of action which is indispensable to its success. The experience of the past has proved that the separation of the eastern and western divisions is injurious to each as well as to the entire line. It was in order to obviate as far as possible this inconvenience that I was appointed the gen'l superintendent of the entire line from Cincinnati to St. Louis, with power to regulate the general and joint business of both divisions, and to settle finally all questions arising between them.

Question 5. Would such a general superintendence obviate the difficulty, and make the sale and division of the road into parcels advisable as practicable, when taking into view the best course of action to be pursued for the interest of all parties?

135 Answer. It would not; the result would still be disastrous to the interests of all concerned.

GEO. B. McCLELLAN.

I, Jno. McLean, jr., special master, do hereby certify that the above-named Samuel Trevor was by me first duly affirmed, and that the above-named George B. McClellan was by me first duly sworn, to testify the truth, the whole truth, and nothing but the truth, and that the foregoing depositions by them respectively subscribed were reduced to writing by them, and were taken at the time and place above specified.

In testimony whereof, I have hereunto set my hand this 5th day of November, in the year 1860.

JNO. McLEAN, JR., *Special Master.*

Receiver's report.

Afterwards, to wit, on the 30th day of November, A. D. 1860, there was filed in the office of the clerk of the court aforesaid the receiver's seventh monthly report, which report is in the words and figures following, to wit:

Seventh monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for October, 1860.

Balance on hand from Sept'b'r account		$36,623 94
RECEIPTS.		
From express freight earnings of Sept	$1,954 36	
" passenger earnings prior to Oct	18,251 69	
" freight do. do	13,163 01	
		33,374 06
From passenger earnings on Oct. acc't	45,399 46	
136 " freight earnings on Oct. acc't	33,370 50	
		78,769 96
From General Post Office, for mail pay to 30th Sept		10,856 25
" other sources		1,601 16
		161,225 37
DISBURSEMENTS.		
Paid charges advanced in account with other roads	$4,564 69	
" advances of former months	15,000 00	
" interest and discounts	1,160 15	
" office and other expenses	1,286 54	
" first-mortgage coupons due July 1, 1858	35 00	
" do. do. " July 1, 1859	21,385 00	
" do. do. " Jan'y 1, 1860	630 00	
" do. do. " July 1, 1860	21,875 00	
" on account of Oct. current expenses	6,751 66	
" on acc't of former arrearages	1,838 80	
" on account of Sept'b'r current expenses and construction work	69,211 27	
		143,738 11
Balance on hand carried to November ac		17,487 26

JOS. W. ALSOP, *Receiver.*

Entry.—Further instructions to receiver.

Afterwards, to wit, on the 21st day of December, A. D. 1860, it being of the October term of the court aforesaid for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry
137 to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI R. R. COMPANY *et al.* } Chancery.

It appearing to the court that it is necessary for the maintaining and successful prosecution of the business of the road of the defendants in this case that further directions and further authority be given to the receiver herein, it

133 No. 6.

Also George B. McClellan, of Cincinnati, county of Hamilton, and State of Ohio, of lawful age, being first duly sworn by me as hereafter certified, deposes as follows:

Question 1. Please state your name and occupation.

Answer. George B. McClellan, railway manager of the Ohio and Mississippi railroad.

Question 2. Please state the extent of your experience as a railway manager, and what has been heretofore your occupation?

Answer. My original occupation was that of a military engineer, having served about 8 years as an officer of the U. S. corps of engineers, and during that period I was in command of one of the parties engaged in the exploration of the route for a Pacific railway. For nearly four years past I have been engaged as a railway engineer and manager; about three and a half years of that time I was the chief engineer and vice-president of the Illinois central railroad, having the management of the affairs of that company in Illinois.

Question 3. Since you have been acting as railway manager of the Ohio and Mississippi railroad, what have been your opportunities of becoming familiar with the road both in regard to its construction and its business?

Answer. Having the general control of the business of the entire line between Cincinnati and St. Louis, and the direct management of all the business, both general and detailed, of the eastern division, I have frequently passed on
134 the road, have made detailed examination of the eastern division, and am every day called upon to decide questions affecting both the local and foreign business of the road, and am entirely familiar with the whole business of the road.

Question 4. Please state, in view of your knowledge of the road, whether a sale of the road in separate divisions would be beneficial or injurious to those parties who own it; I refer simply to the eastern division.

Answer. A separation of the eastern division into two or more parts would be disastrous in the extreme to all parties interested. Such a division would greatly increase the expense of operating the road, and would injure its business and destroy that unity of action which is indispensable to its success. The experience of the past has proved that the separation of the eastern and western divisions is injurious to each as well as to the entire line. It was in order to obviate as far as possible this inconvenience that I was appointed the gen'l superintendent of the entire line from Cincinnati to St. Louis, with power to regulate the general and joint business of both divisions, and to settle finally all questions arising between them.

Question 5. Would such a general superintendence obviate the difficulty, and make the sale and division of the road into parcels advisable as practicable, when taking into view the best course of action to be pursued for the interest of all parties?

135 Answer. It would not; the result would still be disastrous to the interests of all concerned.

GEO. B. McCLELLAN.

I, Jno. McLean, jr., special master, do hereby certify that the above-named Samuel Trevor was by me first duly affirmed, and that the above-named George B. McClellan was by me first duly sworn, to testify the truth, the whole truth, and nothing but the truth, and that the foregoing depositions by them respectively subscribed were reduced to writing by them, and were taken at the time and place above specified.

In testimony whereof, I have hereunto set my hand this 5th day of November, in the year 1860.

JNO. McLEAN, JR., *Special Master.*

Receiver's report.

Afterwards, to wit, on the 30th day of November, A. D. 1860, there was filed in the office of the clerk of the court aforesaid the receiver's seventh monthly report, which report is in the words and figures following, to wit:

Seventh monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for October, 1860.

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RECEIPTS.		
From express freight earnings of Sept	$1,954 36	
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" freight do. do	13,163 01	
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From passenger earnings on Oct. acc't	45,399 46	
136 " freight earnings on Oct. acc't	33,370 50	
		78,769 96
From General Post Office, for mail pay to 30th Sept		10,856 25
" other sources		1,601 16
		161,225 37
DISBURSEMENTS.		
Paid charges advanced in account with other roads	$4,564 69	
" advances of former months	15,000 00	
" interest and discounts	1,160 15	
" office and other expenses	1,286 54	
" first-mortgage coupons due July 1, 1858	35 00	
" do. do. " July 1, 1859	21,385 00	
" do. do. " Jan'y 1, 1860	630 00	
" do. do. " July 1, 1860	21,875 00	
" on account of Oct. current expenses	6,751 66	
" on acc't of former arrearages	1,838 80	
" on account of Sept'b'r current expenses and construction work	69,211 27	
		143,738 11
Balance on hand carried to November ac		17,487 26

JOS. W. ALSOP, *Receiver.*

Entry.—Further instructions to receiver.

Afterwards, to wit, on the 21st day of December, A. D. 1860, it being of the October term of the court aforesaid for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry
137 to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI R. R. COMPANY *et al.* } Chancery.

It appearing to the court that it is necessary for the maintaining and successful prosecution of the business of the road of the defendants in this case that further directions and further authority be given to the receiver herein, it

is ordered that said receiver be authorized to take such steps and make such payments, and do all such things, as may be necessary, in his judgment, to comply with the provisions of the ordinance granting to the company the right of way through William street, in the city of Lawrenceburg, Indiana, and establishing and preserving the grade of said street, to enable the company to retain the right to use and occupy said William street; and he is further authorized, in his discretion, to complete contracts for right of way on other parts of said road, and to compromise and settle all matters relating to or affecting the right of way, switch, depot grounds, and also to build such additional fences as may be absolutely necessary to protect the road and to save the said company from loss. And the court being satisfied that the condition of the iron on the said road is such as to make it absolutely necessary to purchase at least five hundred tons of iron, it is ordered that the said receiver be authorized to
138 purchase, either for cash or upon credit, at least five hundred tons of iron, and to provide for the payment of the same out of the net earnings of the road at as early a day as possible. And it being represented to the court that in the payment of taxes some third parties paid taxes on the property of the company by mistake, it is ordered that in such cases the said receiver refund to said parties the taxes so paid. And for the further purpose of enlarging the powers of said receiver, he is authorized to compromise all just claims against the company for injuries done to passengers on said road, and in case of accidents to passengers and employés, to employ and pay physicians and nurses for the time being, according to his sound discretion; to pay off such legal taxable costs in suits and judgments as in his discretion should be paid; to adjust and pay parties for claims for carrying the mail where the company has received the pay for the same, and for amounts due under contracts relating to the transportation of passengers and baggage to and from the depots; to prosecute such suits in the State courts as counsel may advise; to recover money due to the company, and also for injuries committed upon the property of the company.

Petition of John Bates.

Afterwards, to wit, on the 27th day of December, A. D. 1860, there was filed in court here, by Chas. Fox, esq., sol'r for the complainant, John
139 Bates, his petition in the premises, which petition is in the words and figures following, to wit:

Circuit court of the United States for the southern district of Ohio.

EDWIN D. MORGAN, GEORGE D. MORGAN, JOHN T. TERY AND SOLON HUMPHREYS
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY and others.

To the honorable the judges of the seventh circuit court of the United States in and for the southern district of Ohio:

The petition of John Bates shows that he is a citizen of Ohio, and that he is the holder and owner of three of the bonds made and issued by the Ohio and Mississippi Railroad Company, each bearing date the first day of December, 1855, signed by the president of said company, and each for the payment of one thousand dollars on the first day of October, in the year 1880, with interest thereon at the rate of seven per centum per annum, payable semi-annually in the city of New York, as per the coupons therefor attached. The numbers of said bonds are sixty-three, (63,) one hundred and thirty-six, (136,) and twelve hundred and fifty-six, (1256.)

He further says that on each of said bonds there is due, as per coupons thereon attached, the following sums, viz: $35 00, due 1st April, 1858; $35 00, due 1st October, 1857; $35 00, due 1st April, 1857; $35 00, due 1st
140 of October, 1858; $35 00, due 1st April, 1859; $35 00, due 1st of October, 1859; $35 00, due 1st of April, 1860; $35 00, due 1st October, 1860, with the interest since accrued thereon. Payment of all the said bonds and coupons are secured by the mortgage mentioned and set forth in the complainants' bill called the second mortgage. He therefore claims a decree for sale of said mortgage premises, and for a distribution of the proceeds of sale; and that under the complainants' bill the rights of this petitioner may be recognized and allowed.

CHARLES FOX, *Solic'r for Compl't.*

Receiver's eighth report.

Afterwards, to wit, on the 3d day of January, A. D. 1861, there was filed, in the office of the clerk of the court aforesaid, the receiver's eighth monthly report in the premises, which report is in the words and figures following, to wit:

Eighth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for November, 1860.

Balance from October account			$17,487 26
Receipts:			
From express freight of October	$2,075 45		
" passengers prior to November	5,278 16		
" freight do. do.	4,477 40		
			11,831 01
" passengers on November ac't	34,195 94		
" freight on November ac't	26,985 41		
			61,181 35
" other sources			3,649 43
			94,149 05
Disbursements:			
141 Paid charges advanced on account with other roads	5,434 10		
Paid interest and discounts	565 76		
" office and other expenses	427 60		
" first mortgage coupons due July 1, 1858	70 00		
" do. do. Jan'y 1, 1859	70 00		
" do. do. July 1, 1859	70 00		
" do. do. July 1, 1850	12,005 00		
" on account of November current expenses	5,074 55		
" on account of former arrearages	4,902 13		
" on account of October current expenses and construction work	63,202 61		
			89,821 75
Balance carried to December acc't			4,327 30

JOS. W. ALSOP, *Receiver.*

Receiver's ninth report.

Afterwards, to wit, on the third day of January, A. D. 1861, there was filed, in the office of the clerk of the court aforesaid, the receiver's ninth report in the premises, which report is in the words and figures following, to wit:

Ninth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for December, 1860.

Balance from November ac't			$4,327 30
Receipts:			
From express freight for November	$1,799 25		
142 " passengers prior to December	10,645 25		
" freight do. do.	5,811 77		
			18,256 53
From passengers on December ac't	24,923 88		
" freight do. do.	17,110 30		
			42,034 18
" other sources			5,759 99
			70,378 00
Disbursements:			
Paid first mortgage coupons due Jan'y 1, 1860	105 00		
" do. do. July 1, 1860	6,895 00		
" interest and discount off currency	3,117 57		
" office and other expenses	144 00		
" on account of December current exp's	554 60		
" on account of former arrearages	800 64		
" on account of November current expenses and construction work	50,493 04		
			62,009 85
Balance carried to January account			8,368 15

JOS. W. ALSOP, *Receiver.*

Entry making Geo. L. and Mary Eigenbradt and S. Gebhart & Co. new parties.

Afterwards, to wit, on the 22d day of January, A. D. 1861, it being of special and adjourned term for December of said court for the year 1860, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY and others. } Chancery.

143 On motion of counsel, it is ordered by the court that George L. Eigenbradt and Mary Eigenbradt, his wife, and Frederick H. Wolcott, holders of second mortgage bonds of said defendant, the Ohio and Mississippi Railroad Company, have leave to set forth their claims as parties plaintiffs with the said E. D. Morgan & Co., and that S. Gebhart & Co., who are also holders of second mortgage bonds, have leave to set forth their claim as parties defendants herein, and this cause stands continued to the next April term of this court.

Receiver's tenth monthly report.

Afterwards, to wit, on the 4th day of March, A. D. 1861, the receiver filed his tenth monthly report in the office of the clerk of the court aforesaid, which report is in the words and figures following, to wit:

Tenth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for January, 1861.

Balance from December ac't			$8,368 15
Receipts:			
From express freight on December ac	$1,651 77		
" passengers prior to January "	5,528 22		
" freight do. do. "	1,974 81		
" mail pay to 31st December	10,856 25		
		20,011 05	
" passengers on January ac	22,821 40		
" freight do.	16,962 75		
		39,784 15	
" other sources		1,887 64	
			70,050 99
Disbursements:			
Paid on ac. of 1st mortg. coupons due July 1, 1848.	1,400 00		
" do. do. Jan'y 1, 1859.	1,400 00		
" do. do. July 1, 1859.	1,400 00		
" do. do. July 1, 1860.	5,495 00		
" do. do. Jan'y 1, 1861.	35 00		
	9,730 00		
" balance of charges advanced	5 62		
" discount and interest	1,219 81		
" office petty expenses	36 42		
" on account of former arrearages	10,501 31		
" on account of December current expenses	$45,759 80		
" on acc't of construction work	654 73		
	46,414 53		
		67,907 69	
Balance carried to February ac't		2,143 30	

JOS. W. ALSOP, *Receiver.*

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Answer of S. Gebhart & Co.

Afterwards, to wit, on the twentieth day of March, A. D. 1861, there was filed in the office of the clerk of the court aforesaid, by N. C. McLean, solicitor for S. Gebhart & Co., their answer in the premises, which answer is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY *et al.*

Answer of S. Gebhart & Co.

145 S. Gebhart & Co., citizens of the State of Ohio, by leave of court thereto, heretofore granted, file their answer, and show that they are the owners and holders of two of the second mortgage bonds of the issue described in the bill of complaints, and secured as therein set forth by a mortgage

upon the railroad of the Ohio and Mississippi Railroad Company. That said bonds are numbered 232 and 233, and the interest thereon is unpaid, and in arrear from April 1, 1856, to the present time, inclusive. These respondents further say that they believe the allegations made by complainants in their bill, on the grounds upon which they ask relief, are true, and they adopt the prayer for relief as therein contained, and ask that they may be paid and their interest protected herein.

N. C. McLEAN, *Sol. for S. Gebhart & Co.*

Bill of complaint of F. H. Wolcott.

Afterwards, to wit, on the 20th day of March, A. D. 1861, there was filed in the office of the clerk of the court aforesaid, by N. C. McLean, esq., solicitor for F. H. Wolcott, his bill of complaint in the premises, which bill is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

Frederick H. Wolcott, a citizen of the State of New York, by leave of court thereto granted, brings this his bill against the Ohio and Mississippi Railroad Company, a corporation by virtue of the laws of the State of Ohio, and having a principal office in the southern district therein, and complaining, says, that he is the holder and owner of twenty-five of the second mortgage bonds issued by the defendant, the The Ohio and Mississippi Railroad Company, and se-
146 cured by a second mortgage upon its railroad, as is fully set forth and described in the bill of complaint filed in this cause of E. D. Morgan & Co., to which reference is hereby made for full particulars in regard thereto; that said bonds are numbered, respectively, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 116, 317, 318, 319, 320, 321, 322, 323, 324, and 325. That the interest is largely in arrear and unpaid upon said bonds, as evidenced by the coupons attached thereto. Your orator, therefore, adopts and makes the bill of complainant filed in this cause by E. D. Morgan & Co. a part and parcel hereof, the same as if it were herein incorporated, so far as may be applicable to the above-enumerated bonds, hereby adopting all the allegations of said bill of complaint, and enjoining in all its prayers for relief to the extent of the interest hereinbefore set forth.

N. C. McLEAN, *Sol'r for F. H. Wolcott.*

Bill of complaint of Geo. L. and Mary Eigenbradt.

And on the same day, to wit, the twentieth day of March, A. D. 1861, there was filed in the office of the clerk of the court aforesaid, by N. C. McLean, sol'r for George L. and Mary Eigenbradt, their bill of complaint in the premises, which bill is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. MORGAN & Co. *vs.* THE OHIO & MISSISSIPPI RAILROAD COMPANY *et al.* } Bill of complaint of George L. & Mary Eigenbradt, his wife.

George L. Eigenbradt and Mary Eigenbradt, citizens of the State of
147 New York, by leave of court thereto heretofore granted, bring this their bill against the The Ohio and Mississippi Railroad Company, a corporation by virtue of the laws of the State of Ohio, and having a principal office in the southern district thereof, and shows that Mary Elizabeth, wife of George L. Eginbradt, is the owner and holder of six of the second mortgage bonds of the defendant, the The Ohio and Mississippi Railroad Company, secured

by a second mortgage upon its railroad, as is fully set forth in the bill filed in this cause by E. D. Morgan & Co., to which reference is hereby made for full particulars in regard thereto; that said bonds are numbered, respectively, six, seven, eight, nine, ten, and thirty-five, and that the interest thereon is in arrear since the year 1856, and the said company neglect and refuse to pay the same. Thereupon your orators adopt and make part and parcel hereof the said bill filed herein by the said E. D. Morgan & Co., so far as the same may be applicable to the bonds hereinbefore enumerated, the same as if it were herein inserted, adopting all and singular the allegations thereof, and the prayer for relief therein contained.

N. C. McLEAN,
Sol'r for G. L. & Mary Eginbradt.

Afterwards, to wit, on the twenty-seventh day of March, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's eleventh monthly report in the premises, which report is in the words and figures following, to wit:

148 Eleventh monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for February, 1861.

Balance from January ac.		$2,143 30
Receipts:		
From express freight on Jan'y acc't	$1,715 29	
" passengers prior to February	13,072 33	
" freight prior to do.	7,265 84	
		22,053 46
" passengers on February ac	20,031 24	
" freight on do.	27,578 86	
		47,610 10
" other sources		207 91
		72,014 77
Disbursements:		
Paid on acc't first mortgage coupons due July 1, 1858	175 00	
" do. do. Jan'y 1, 1859	175 00	
" do. do. July 1, 1859	175 00	
" balance of charges with other roads	6,386 90	
" discount and interest	1,373 29	
" sundry office expenses	249 45	
" on account of former arrearages	9,823 74	
" on acc't of January current expenses and construction work	44,009 64	
" on acc't of February current expenses	5,679 12	
		68,047 14
Balance carried to March ac.		3,967 63

JOS. W. ALSOP, *Receiver.*

Entry.—Further instructions to the receiver.

149 Afterwards, to wit, on the 30th day of March, A. D. 1861, it being of the special and adjourned term of February, for the year last aforesaid, of the court aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to made in the premises, which entry is in the words and figures following, to wit:

E. D. Morgan & Co.
vs.
The Ohio and Mississippi Railroad Company *et al.* } Chancery.

In addition to the former order directing the receiver in this case to prosecute and defend suits in the State cour s, it is ordered by the court that the receiver in this case, in the name of the railroad company, apply to the court of common pleas of Hamilton county, Ohio, in the case of S. S. L'Hommedieu, against the Cincinnati and White Water Canal Company and others, pending in said court, for leave to make the said railroad company defendant, and to file a cross petition in said case, under the rules and practice of the State courts, and that he, in the name of said company, file an answer and cross petition in said court.

Amended bill of complainants.

Afterwards, to wit. on the 29th day of April, A. D. 1861, there was filed in court here the amended bill of the complainants, which amended bill is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. Morgan & Co.
vs.
The Ohio and Miss. Railroad Company and others.

Your orators, by leave of court thereto granted, amend their bill, and
150 say that they have duly made a request in writing of the said defendants, George Hoadley and Edmond D. Mansfield, trustees of the 2d mortgage of the said defendant, the Ohio and Miss. Railroad Company, to proceed and execute the trust confided to them, according to its terms, inasmuch as default had been made in the non-payment of the interest due upon said 2d mortgage bonds of the said defendant, the The Ohio and Miss. Railroad Company; and your orators pray that said trustees may be decreed to execute the powers conferred upon them by said 2d mortgage under the supervision of this court, and that such full relief may be granted your orators in the premises as may be just and equitable, whether specifically prayed for in terms or not.

N. C. McLEAN,
Solicitor for Complainants.

Replication of complainants.

On the same day, to wit, the twenty-ninth day of April, A. D. 1861, there was filed in court here the replication of the complainants, which replication is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. Morgan & Co.
vs.
The Ohio and Miss. Railroad Co. *et al.* } Replication.

The complainants, for replication to the several answers herein filed by the various defendants, say that all the matters and things which they have alleged in their bill, and the amendments there , are true, in substance and in fact, and they will prove the same to the satisfaction of the court.

N. C. McLEAN, *Sol. for Complainants.*

151 Afterwards, to wit, on the twenty-ninth day of April, A. D. 1861, it being of the April term of the court aforesaid, for the year last aforesaid,

this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

Decree.

Edwin D. Morgan, George D. Morgan, John T. Terry, and Solon Humphreys, partners under the name of E. D. Morgan & Co., and others, *vs.* The Ohio & Mississippi Railroad Company; Edward D. Mansfield and George Hoadley, trustees; Marshall O. Roberts, John J. Phelps, and Henry A. Coit, trustees; Edwin Bartlett, David Hoadley, and G. S. Robbins, trustees; the city of Cincinnati, Jethro Mitchell, Richard W. Keys, Samuel Wann and Hugh McBirney, (partners under the name of Wann & McBirney,) Henry Hanna, Peter Zinn, D. F. Goodhue, S. G. Gebhart & Co., and others.

This cause coming on to be heard upon the bill of the complainants herein, and the amendment thereof, the answers of the Ohio & Mississippi Railroad Company, Edward D. Mansfield, and George Hoadley, trustees; Henry Hanna, Peter Zinn, Richard W. Keys, D. F. Goodhue, S. Gebhardt & Co., and John Bates, and the replication of the complainant, and the reports of the master and of the receiver, and the exhibits and testimony herein; and as to the said Bartlett, Aspinwall, Leavitt, Learned, Comstock and Booth, who, as trustees
152 of an express trust, were made defendants on Sep. 12th, 1860, and Henry Chauncey, and Larz Anderson, and Samuel J. Broadwell, trustees, &c., who were also made defendants on same day, this bill is dismissed without prejudice; this dismissal as to said Bartlett as trustee, as above, is not to be held a dismissal of said bill as to said Bartlett as one of the trustees named in the deeds of trust, executed by said railroad company to said Edward Bartlett, with David Hoadley and G. S. Robbins; but said Bartlett, as trustee, named in said deeds of trust, is continued, and remains a defendant hereto. And the said defendants, Marshall O. Roberts, John J. Phelps, and Henry A. Coit, trustees; Edwin Bartlett, David Hoadley, and G. S. Robbins, trustees; and the city of Cincinnati, being duly served with process, and having failed to answer herein, make default; and the said bill is therefore taken as confessed as to the said defendants who have not answered, and therefore are in default, and the facts as alleged therein are taken as true. And the court having carefully examined the pleadings and proofs, and upon due deliberation thereon being had, the court do find that the said The Ohio and Mississippi Railroad Company is a corporation duly authorized and incorporated by the several acts of the legislatures of the States of Ohio and Indiana; that said corporation has been duly or-
153 ganized under said laws; that said corporation, by said acts of said legislatures of Indiana and Ohio, was duly authorized and invested with power to locate, construct, maintain, repair, and operate a railroad and all its appendages between (and including) the city of Cincinnati, in Ohio, and Vincennes, on the Wabash river, in Indiana, with as many sets of tracks as the company might from time to time deem necessary; and said company was and is authorized by its said charter to enter upon and use and excavate and build upon any land wanted for the site of said railroads tracks and turn outs, and the erections of stations, shops, pens, warehouses, and other works necessary and proper for said railroad, in the construction, use, and in the repairing said railroad and its works and appendages, and to take and use any earth, timber, gravel, stone and other materials which might and may be wanted for the construction and repair of any part of said road or any of its works and appendages; and in all cases where the owners of said land and materials refuse to relinquish the same, and where a contract between the parties cannot be made, ample provisions are made in said charter, in each of the said States, for the condemnation of said property, and for the payment of the same; and said company was and is authorized by its charter to charge, take, and receive such tolls for the trans-

portation of persons and property and carriages on said road, or any part thereof, as should and shall be for the interest of said company, and to change, lower, or raise the same at the pleasure of the company. And the court further find that said company, under and by virtue of said power, proceeded to and has obtained the right of way, and has constructed said railroad connecting the city of Cincinnati, in Ohio, and Vincennes, in Indiana, with all the usual appendages and works, stations, shops, &c.; and said company have been and now are operating and working said road as a continuous railway for the transportation of persons and property, charging and receiving tolls therefor; that for the purpose of constructing said railroad, and furnishing the same with cars, locomotives, and other machinery, to carry on the operations of said company, was authorized to borrow money and to issue its corporate bonds; and to secure the re-payment of said money and the payment of said bonds, the said company was authorized to mortgage the said road, its income, the franchises of said corporation, and the other property of said company. And the court further find that in the exercise of the power given to said company by its charter, the said company, in due form of law, issued its corporate bonds, and to secure the payment of the same, and the interest thereon as the same accrued, mortgaged, by several distinct deeds of trust, the said road as an entirety, the income thereof, the franchises of said corporation, and the other property of said company, and the rolling stock and furniture of said road, as hereinafter more specifically set forth.

And the court further find that on the —— day of —— the said railroad company hired for the use of said company, from William H. Aspinwall and his associates, 14 locomotives, 2 passenger cars, 3 express cars, 1 baggage car, 185 freight cars; which rolling stock, by the agreement of the parties, was valued at the sum of $226,100 00, and which rolling stock is the property of said Aspinwall and his associates; that the said company agreed with said Aspinwall and his associates to pay to them annually, for the use of said rolling stock, a sum equal to ten per cent. upon said valuation, and also annually a sum equal to ten per cent. upon said valuation for depreciation in the value of said rolling stock by the use thereof; and in case said company should at any time purchase said rolling stock at said valuation, which it has the right to do, the sum so allowed and paid for depreciation is to be deducted from said agreed valuation of said property. And the court further find that on the 9th day of April, 1860, there was due to the said Aspinwall and his associates on said contract, for the hire of said rolling stock and for the depreciation in value thereof, the sum of $109,389 00, including interest up to April 1st, 1860. And that on and since the said 9th day of April, 1860, the said railroad company, by the receiver appointed by this court, were, have been, and now are, using said rolling stock under said agreement, and that the rent for the same, and the amount agreed to be allowed for the depreciation in the value thereof, has been and is now accruing at the rate aforesaid, and the same is due and owing to said Aspinwall and others; and the court find that said sum which has accrued since said 9th day of April, 1860, inclusive, under said contract, and the amount yet to accrue under the same being, as the court find, for the hire and use of necessary stock wherewith to operate said road, and thereby earn tolls, are part of the necessary expenses of said road, and should be paid to said Aspinwall and others, as a part of the necessary expenses of said road, before the claims of any of the parties hereto, and has priority over all the mortgages and other claims against said company; and as to the questions whether the said sum of $109,389 00, with interest from the 1st day of April, 1860, due to said Aspinwall and his associates, as aforesaid, is and was a part of the necessary expenses of said road, and whether the same has priority over all or any of the other claims against said company or not, the court do not now determine, but said questions are expressly reserved for future determination, without

prejudice to the rights of any and all parties in interest. And the court further find that the said railroad company, for the purposes already stated herein, on the 24th day of May, 1852, issued under its corporate seal, and attested by its officers, two thousand and fifty bonds of one thousand dollars each, dated the 24th day of May, 1852, the principal of each bond payable at the North River Bank, in the city of New York, on the 1st day of July, 1872, and the interest on said principal, at the rate of 7 per cent. per annum, payable as the same accrued, semi-annually, on the 1st days of July and January in each year, at said bank in New York, on the presentation and delivery of dividend warrants, which were annexed to each of said bonds. And the court find that said company, for the purpose of securing the payment of said bonds and the interest thereon, according to the tenor and effect of said bonds, and in the exercise of the power given to said company by its charter, did, in due form of law, make, execute and deliver to Marshall O. Roberts, John A. Phelps and Henry A. Coit a deed of trust, otherwise called a mortgage, which deed it is said in the body thereof to have been made on the 24th day of May, 1852, but in fact was executed by said railroad company on
158 the 10th day of June, 1852, whereby said company conveyed to said Marshall O. Roberts, John A. Phelps and Henry A. Coit, and the survivors of them, and their or his successors, in trust, all and singular the railroad constructed and to be constructed by the said company in Indiana and Ohio, as aforesaid, together with all the track rails, bridges, buildings, fixtures, and the lands upon which the same are situated, and all the privileges, franchises and rights whatsoever of the said company, and the tolls, incomes, issues and profits thereof, and all the depots and stations, and the real estate upon which they are situated, and all the locomotives, tenders, cars, all machinery which are now owned or hereafter may be owned, or in any way belong to said company, and all which may now or hereafter appertain or belong to said road, or any part thereof, in trust, however, to the said Marshall O. Roberts, John A. Phelps and Henry A. Coit, for the sole use and benefit of the holders of the said two thousand and fifty first mortgage bonds for one thousand dollars each, bearing date May 24th, 1852, and payable in the city of New York July 1st, 1872, amounting together to the sum of two million and fifty thousand dollars, and the interest thereon as aforesaid. And the court further find that all of said bonds are outstanding against said company, and that the interest due and unpaid thereon on the first day January, 1861, as the same accrued,
159 amounted to the sum of $215,145 00, and that all the interest other than said sum of $215,145 00 has been paid by said company. And the court further find that the said bonds and the said interest thereon are secured by the terms and provisions of the said first mortgage upon the property and franchises of the said railroad company, as hereinbefore recited, and that said first mortgage has been duly recorded in the several counties in the States of Ohio and Indiana, into and through which the railroad of said company passes, or in which the property of said company is situated or employed, and constitutes a valid and the first lien upon all and singular the said railroad of the said company and its property, as hereinbefore recited and specified, subject to the payment of the amount due and to become due for the use of rolling stock as aforesaid. And the court further find that the said railroad company, on the 1st day of December, 1853, for the purposes already stated, issued under its corporate seal, and attested by its officers, fifteen hundred bonds for one thousand dollars each, dated December 1st, 1853, the principal of each bond payable at the Bank of America, in the city of New York, on 1st day of October, 1880, and the interest on said principal, at the rate of 7 per cent. per annum, payable semi-annually, on the 1st days of April and October in each
160 year, at said bank in the city of New York, on the presentation and delivery of the dividend warrants for said interest, which were annexed

to each of said bonds. And the court further find that said company, for the purpose of securing the payment of said last recited-bonds and the interest thereon, according to the tenor and effect thereof, and in the exercise of the power given to said company by its charter, did, on the 1st day of December, 1853, make, execute and deliver a certain other mortgage, called the second mortgage, whereby it conveyed to Edward D. Mansfield and John McLean, but the said John McLean declining to act, the said George Hoadly was in due legal form substituted in his stead, and became, with the said Mansfield, the grantee of said second mortgage, and the survivor and their and his successors in trust, all and singular the railroad of said company and its entire property and franchises, in the same manner and language as hereinbefore recited in describing the property and franchises conveyed by the said first mortgage of said company, in trust, however, to the said Edward D. Mansfield and George Hadley, for the sole use and benefit of the holders of said fifteen hundred bonds, or of any of them, for one thousand dollars each, dated December 1st, 1853, and bearing interest at the rate of 7 per cent. per annum, payable semi-annually in
the city of New York, and the principal thereof being payable in said city
161 of New York on the 1st day of October, 1880, subject to the terms of said bonds. This mortgage upon its face declared that it was and is subject to a prior mortgage on said property to secure the sum of two million and fifty thousand dollars, being the mortgage hereinbefore found to be the first lien on said property, which said second mortgage was thereupon, on said 1st of December, 1853, recorded in all the several counties in the States of Indiana and Ohio, into and through which the railroad of said company passes, and in which said property is situated and employed. And the court further find that only two hundred and fifty-eight of said bonds are now outstanding and valid obligations against said defendant, the The Ohio and Mississippi Railroad Company, the others of said bonds having been redeemed and cancelled, and that the interest due and unpaid on said two hundred and fifty-eight bonds, on the 1st day of April, 1861, amounting to the sum of $99,330 00. And the court further find that the said two hundred and fifty-eight bonds, amounting to the sum of two hundred and fifty-eight thousand dollars, together with the interest thereon according to the terms of said bonds, up to the 1st day of April, 1861, amounting to the sum of $99,330 00, and the accruing interest, are secured by the terms and provisions of said second mortgage upon the property and franchises
of sail railroad company as hereinbefore recited, and constitutes the second
162 valid lien upon all and singular the said railroad of the said defendants, the The Ohio and Mississippi Railroad Company and its property and franchises as hereinbefore recited and described, subject only to the prior lien of the said first mortgage and the amount due and to become due for the use of said rolling stock aforesaid since the 9th day of April, 1860, and the questions reserved as to the amount and priority of the claim of Aspinwall and his associates prior to said 9th April, 1860; and the court find that the complainants, E. D. Morgan & Co., in this case, are the holders of seventy-two of said second mortgage bonds of one thousand dollars each, secured by said mortgage of the date of December 1st, 1853, and that on a portion of said bonds the interest falling due on the 1st day of October, 1855, is in default and unpaid, and the dividend warrants of all of said bonds due on the 1st day of April, 1856, and those due every six months thereafter are in default and unpaid, and that by reason of the premises and of the neglect of the trustees named in said second mortgage deed to enforce the payment of said interest, the equity of the case is with the complainants, and they are entitled to the interposition of this court in their behalf. And the court further find that said The Ohio and Mississippi
Railroad Company is insolvent and unable to pay its debts and to prosecute
163 its business and to carry on and operate its road, but the court are of the opinion that the said road and its appendages, as described in said trust

deeds, with all the franchises of said corporation, are more than sufficient to pay the interest as it accrues upon the said mortgage bonds of two millions and fifty thousand dollars and the principal when due, and the money found to be prior thereto and the costs of this suit; and that in case of a sale of said property described in said trust deeds, including the franchises of said corporation, the same should be sold subject to the payment of the said principal of said two millions and fifty thousand dollars at the maturity of said bonds, according to their tenor and effect, and the semi-annual payment of the interest of said bonds, as the same accrues on and after a day hereinafter fixed and determined in this decree. And the court further find the fact to be, as alleged and set forth by the complainants in their said bill of complaint, that in the said second mortgage deed it was expressly stipulated, provided and agreed by and between the parties thereto, that if default should be made by the said Ohio and Mississippi Railroad Company in the payment of either principal or interest of the bonds, or of any of them, secured by said second mortgage, it should be lawful for the trustees therein named, upon the request in writing of any one or more
164 of the holders of the bonds secured by said mortgage, to sell and dispose of all and singular the franchises specified and described in said deed of mortgage, including the personal property thereby mortgaged or intended so to be, and for all benefit and equity of redemption thereof by the said Ohio and Mississippi Railroad Company, at public auction, giving at least three months' notice of the time, place, and terms of sale, by advertising the same in one or more newspapers, one of which to be a paper published and of general circulation in the city of Cincinnati, and, as the attorneys of the Ohio and Mississippi Railroad Company, for that purpose by the said deed of mortgage duly constituted, to make and deliver to the purchaser or purchasers of said premises and personal property good and sufficient deeds of conveyance and of assignments of the same in fee simple, which sale it was further agreed and declared by the parties to said mortgage deed should be a perpetual bar against the said Ohio and Mississippi Railroad Company and all persons claiming by, from, or under them: provided, nevertheless, that upon payment of the amount due upon each of the bonds secured by said mortgage previous to the day of sale, together with the costs, if any, which shall have accrued on said bonds, or any of them, then the proceedings of the said trustees, under the said power of sale, should be
165 stayed, and the Ohio and Mississippi Railroad Company should be restored to all they had lost, and the said deeds of mortgage, and the rights of all the parties thereto should thereafter stand as if no default had been made. And the court do further find that in law and in fact the aforesaid power to sell and dispose of said premises and personal property, including the mode in which said power might be exercised, is a material and substantial part of the contract between the parties to said mortgage deed, and of the security thereby created, and was intended so to be; and as such material and substantial part of the contract between the said parties, the party for whose benefit it was made has in equity a right to a specific performance and execution thereof for the default, and in the mode in said deed of mortgage specified and provided for. And the court do further find that the said Ohio and Mississippi Railroad Company did make default, as in said bill is alleged, in payment of the interest which fell due on the bonds secured by said mortgage deed on the 1st day of October, 1855, the first day of April, 1856, the first day of October, 1856, the first day of April, 1857, the first day of October, 1857, the first day of April, 1858, the first day of October, 1858, the first day of April, 1859, and the first day of October, 1859, and that all and each of said instalments of interest still remain due and unpaid; and by reason of such default in the payment of the interest aforesaid the
166 said complainants (as owners and holders of the bonds which they in their said bill of complaint allege to belong to them, and which allegation is proved to be true in fact) are in equity entitled to a specific execution and

performance of the power given as aforesaid to the trustees in said mortgage deed to sell and dispose of the mortgaged premises and personal property in the mode provided for in said mortgage deed. And the court do further find that the said complainants, in pursuance to the requirements of said power in said deed of mortgage contained, have, in writing, requested said trustees to enter into possession of said mortgaged premises, and to sell and dispose of the same according to the terms and provisions of said power: wherefore, it is ordered and decreed that the said defendants, Edward D. Mansfield and George Hoadly, as the attorneys of said railroad company, do and shall proceed, in the manner provided for and agreed upon by the parties aforesaid in said deed of mortgage, to sell and dispose of the premises, including the personal property in said deed of mortgage specified, and all benefit and equity of redemption of the said Ohio and Mississippi Railroad Company therein, at public auction, at the door of the United States court-house in Cincinnati, after giving at least three months' notice of the time, place, and terms of sale, by advertising the same in the following newspapers, that is to say, a newspaper printed and published in the
167 towns of Laurenceburg, Vernon, Brownstown, and Washington, and in two papers in Vincennes, in Indiana, and also in the Enquirer, the Commercial, and the Cincinnati Gazette, which last-named papers are published and are of general circulation in the city of Cincinnati; and on such sale, and the confirmation thereof by this court, the said Edward D. Mansfield and George Hoadly, as the attorneys of the said railroad company, by said deed of mortgage duly constituted, shall make out and deliver to the purchaser or purchasers of said mortgaged premises, including the personal property aforesaid, a good and sufficient deed of conveyance and of assignment of the same in fee simple: provided, that if said railroad company shall, on or previous to the day of sale, make payment to said Mansfield and Hoadly of the amount due for interest on each of the bonds secured by said mortgage deed, (together with the cost of this suit,) then the said sale shall not be had or made. Which sale shall be made on the following terms, viz: 1st. Subject to the principal of the bonds secured by said first mortgage, that is to say, to the payment at maturity of said sum of $2,050,000 00, according to the tenor and effect of said bonds, and subject to the payment of the interest on said bonds as the same shall accrue and be-
168 come due on and after the first day of January, 1862; and the said mortgage lien upon all of said property for the said principal and for all the interest which accrues and becomes due upon said bonds on and after the first day of January, 1862, according to the tenor and effect of said bonds, shall be and remain in full force in law and equity against the said purchaser or purchasers and all others, notwithstanding this decree and sale, and the proceedings herein shall not prejudice the rights of said trustees and all others in interest to proceed at law or in equity upon said bonds and mortgage in case default be made in any of the conditions of the same. 2d. The said railroad and property shall not be sold for less than one million of dollars, unless the court shall hereafter otherwise order; and to avoid fictitious bidding, and relieve said trustees and attorneys from embarrassment thereby, it is further ordered that no bid of any person or persons shall be received unless the said person or persons previous to making such bid shall have deposited in the Commercial Bank of Cincinnati as a special deposit, subject to the order of said trustees and attorneys as aforesaid, either the sum of fifty thousand dollars in lawful money of the United States, or $100,000 in the first or second mortgage bonds of the defendants hereinbefore described, and shall
169 deliver to said trustees and attorneys the proper evidence thereof. And it is ordered by the court that if any person or persons making any bid as aforesaid shall fail to comply with the order of the court herein, or at the confirmation of said sale, or the distribution of the proceeds thereof, that such person or persons shall lose or forfeit either the money or bond, whichever may have been deposited as aforesaid, and the same shall be converted to the use of

the creditors of said company in the payment of their claims according to the priority thereof. And the court being advised that there is pending in the circuit court of the United States for the district of Indiana a like proceeding in chancery, in which the said E. D. Morgan and others are plaintiffs and the Ohio and Mississippi Railroad Company and others are defendants, upon the same deed of trust set forth in the plaintiffs' bill in this case, seeking an enforcement of the said power and contract of sale, for the purpose of paying the amounts due and in arrear upon said mortgage bonds, and it being for the interest of all parties that the courts in the two jurisdictions should act in harmony, it is ordered that no sale be made under the proceedings in this court until a decree substantially like this decree be entered in said cause pending in said court for the district of Indiana, or until the further order of this
170 court. Any person having made said deposit, and concluding not to bid upon said property, may withdraw his said deposit at any time before the sale aforesaid is had, and may also withdraw the same at any time after said sale if he shall not have become the purchaser of said mortgaged premises. And it is further ordered and decreed by the court that out of the proceeds of said sale shall be paid: First, all costs and expenses of this suit, and also the legal costs and expenses in said cause in the district of Indiana to be taxed, and of said trustees and attorneys. Second, the amounts which have accrued from the 9th day of April, 1860, up to the day of the confirmation of the sale and conveyance as aforesaid, upon the terms hereinbefore stated, to said William H. Aspinwall and others, for the use and the depreciation of said rolling stock. Third, the liabilities on contracts made by the receiver since his appointment, whether the contracts are made and liabilities incurred in his own name or that of the company, and the balance due him for payments made by him in the discharge of his duty as receiver. Fourth, to the full payment and satisfaction of the said sum of $215,145, the interest in arrear and unpaid upon said first mortgage bonds up to and including that due on 1st January, 1861, and also to the full payment of the interest upon said first mortgage bond due and payable on the first day of July, 1861. Fifth, to the full payment and
171 satisfaction of the $258,000 of second mortgage bonds and the dividend warrants thereon due and owing up to the time of payment, according to the terms of said bonds and dividend warrants. The order for the payment of the interest of the first mortgage bonds and the principal and interest of the second mortgage bonds is subject, nevertheless, to the questions already reserved, whether the amount due Aspinwall and others for the use and depreciation of rolling stock prior to 9th April, 1860, is and was a part of the expenses of said road, and whether the same has or has not priority over all or any of the other claims against said company; and for the purpose of making the payments of interest on the said first mortgage bonds, the purchaser or purchasers may pay to the extent of that interest realized by said sale in cash or in the dividend warrants of said first mortgage bonds which were due and payable after the 1st day of January, 1858; and for the purpose of making payments of the principal and interest of the said second mortgage bonds, the purchaser or purchasers may pay to the extent of said principal and interest realized by said sale in cash or in the said bonds and dividend warrants attached to said bonds. Sixth. And the residue of the proceeds of sale, if any, shall be held by
172 said Mansfield and Hoadly, trustees and attorneys as aforesaid, subject to the order and to the further distribution of the court, as the court may thereafter order and decree. And all other questions as to the amount and character of all other claims against said company, and the priorities, if any among them, are expressly reserved for future determination after said sale shall be had, without prejudice to the rights of the parties. And it is by the court further ordered and decreed that the purchaser or purchasers at any sale which

may be made as herein provided of said railroad property and franchises of the said defendant, the Ohio and Mississippi Railroad Company, as hereinbefore set forth and described in said second mortgage or deed of trust, shall, upon confirmation and full performance of the conditions thereof, have, hold, and take the premises, property, franchises, and rights so sold as aforesaid, to him or them, his or their heirs, successors, and assigns forever, free from and acquit and discharged of every lien, claim, or demand whatever against the same, whether by judgments, mortgage, or otherwise, by and in behalf of any person, body corporate or politic, as creditor, corporator, or stockholder of the said the Ohio and Mississippi Railroad Company, excepting only the said first mortgage debt of $2,050,000, and the interest on said bonds as the same accrues and becomes due, on and after the first day of January, 1862, according to the tenor and effect of said bonds and the dividend warrants thereto annexed; and
173 immediately upon the confirmation of said sale, such purchaser or purchasers shall be entitled to a deed therefor, as hereinbefore provided for, and to the immediate possession thereof, to be delivered to him or them by the receiver, to be owned, held, possessed, used, carried on, and maintained, repaired, and operated by such purchaser or purchasers, his or their heirs, successors, and assigns, by the same right, with all the privileges and for all the same purposes which the same were or might be held, possessed, used, repaired, maintained, carried on, and operated by said railroad company under its charter and the laws aforesaid, and the same to sell, pledge or dispose of, in whole or in part, as absolute owner thereof. And it shall be the duty of the marshal of the district, upon application to him by the receiver, to see that the said purchaser or purchasers are put in possession of said property, and to that end a writ of possession shall issue to said marshal, upon the application of said receiver to the clerk of this court therefor. And it is hereby made the duty of said receiver to procure and cause to be made out a correct schedule of all and singular the property and premises in the second mortgage or deed of trust described and referred to, and file one copy thereof with the clerk of this court at least 30 days prior to the day of sale of said property, which said schedule shall be open to the
174 examination of all parties who may desire to purchase the same, or who may have an interest therein; and said receiver shall deliver another copy of said schedule to the said Hoadly & Mansfield, the trustees and attorneys as aforesaid, who shall hold the said schedule for the inspection of all persons desiring to examine the same; and for the execution of this decree this cause is continued until the October term next of this court.

Receiver's twelfth monthly report.

Afterwards, to wit, on the eighth day of May, A. D., 1861, there was filed in the office of the clerk of the court aforesaid the receiver's twelfth monthly report in the premises, which report is in the words and figures following, to wit:

Balance from February ac			$3,967 63
Receipts:			
From express freight on February ac	$1,524 71		
" passengers prior to March	5,291 26		
" freight prior to March	2,905 68		
			9,721 65
" passengers, March acc't	32,195 14		
" freight on March acc't	31,446 77		
			63,644 91
" other sources			602 86
			77,937 05

Disbursements:

Paid balance of charges with other roads	$3,249 89		
" discount and interest	1,799 78		
" sundry office expenses	16 45		
Paid on account of March current expenses	8,449 42		
175 " ticket balance, southern R. R. Co	1 45		
" on account of former arrearages	7,619 06		
Paid on account of February current expenses	40,965 08		
			$62,101 13
Balance carried to April account			15,835 92

JOS. W. ALSOP, *Receiver.*

Thirteenth monthly rep't of receiver.

Afterwards, to wit, on the twenty-ninth day of May, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's thirteenth report in the premises, which report is in the words and figures following, to wit:

Thirteenth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for April, 1861.

Balance from March account			$15,835 92
Receipts:			
From express freight, on March account	1,657 76		
" passengers prior to April	8,639 07		
" freight	4,836 27		
			15,127 10
" collection on mail service to 31st March			771 62
" passengers on April account	22,492 84		
" freight on	16,920 29		
			39,413 13
" charges advanced to other roads			3,829 72
" other sources			50 00
			75,029 49
176 Disbursements:			
Paid notes on acc't of 500 tons of iron purchased per order of court	$7,169 71		
" discount and interest	3,322 77		
" sundry office expenses	491 55		
" on account of former arrearages	1,995 78		
" on account of March current expenses and construction work	54,429 24		
			67,409 05
Balance carried to May account			7,618 44

JOS. W. ALSOP, *Receiver.*

Instructions to Mansfield and Hoadly, trustees.

Afterwards, to wit, on the second day of July, A. D. 1862, it being of the special and adjourned term of June, of the court aforesaid, for the year last

aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY *et al.* } In chancery.

And now comes Edward D. Mansfield and George Hoadly, defendants in this cause, heretofore directed to make sale of certain property; and upon their request for instructions as to the number of advertisements to be published of the notice of said sale, it is now ordered that the said notice be published at Vincennes, Washington, Brownstown, Vernon, and Lawrenceburg, once a week, and at Cincinnati daily, for the period of three months before the day of
177 sale, in the several papers specified in the decree heretofore entered.

Fourteenth monthly report, (receiver's.)

Afterwards, to wit, on the 13th day of July, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's 14th monthly report in the premises, which report is in the words and figures following, to wit:

Fourteenth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for May, 1861.

Balance from April account		$7,618 44
Receipts:		
From express freight for April	$1,651 76	
" mail service to 31 March, 1861	10,084 59	
" passengers prior to May 1	7,018 96	
" freight prior to May 1	4,087 66	
		22,842 97
" passengers on May account	15,723 67	
" freight on May account	24,379 44	
		40,103 11
" charges advanced to other roads		1,115 18
" other sources		1,308 15
		72,987 85
Disbursements:		
Paid note on account of iron purchase	$2,396 03	
" discount and interest	2,013 27	
" sundry office expenses	129 20	
" on account of April and May, current expenses	38,791 79	
" 271 coupons of interest, first mortgage bond, due July 1, 1860	9,485 00	
		52,815 29
Balance carried to June ac		20,172 56

JOS. W. ALSOP, *Receiver.*

178 *Entry authorizing receiver to borrow money.*

Afterwards, to wit, on the 2d day of July, A. D. 1861, it being of the special and adjourned term of the court aforesaid for the month of July, of the year last aforesaid, this cause came on for further hearing; and thereupon the court

ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE O. & MISS. RAILROAD Co. } In chancery.

It appearing to the court in this case that by reason of the partial destruction of a bridge over the Great Miami river, and other casualties, the successful prosecution of the business of the railroad company will require the expenditure of money in excess of the current receipts of the road, the receiver is therefore authorized to borrow, in the name of the railroad company, such sums of money as he may find necessary, and he is ordered to report to the court the amounts borrowed, the rate of interest, and the duration of the loans.

Receiver's fifteenth monthly report.

Afterwards, to wit, on the seventeenth day of August, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's 15th report in the premises, which report is in the words and figures following, to wit:

Fifteenth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for June, 1861.

Balance from May account			$20,172 56
receipts:			
From express freight for May	$1,715 29		
179 " passengers prior to June 1st	6,688 70		
" freight prior to June 1st	9,521 30		
			17,925 29
From passengers on June account	15,752 80		
" freight on June account	14,168 89		
			29,921 69
" other sources			108 42
			68,127 96
Disbursements:			
Paid balance of charges with other roads	614 88		
" note on account of iron purchase	3,208 19		
" discounts and exchange	518 73		
" sundry office expenses	285 00		
" on account of former arrearages	13,098 32		
" on account of April, current expenses	20,271 05		
" on account of May and June "	6,717 72		
			44,713 89
Balance carried to July ac			23,414 07

JOS. W. ALSOP, *Receiver.*

Afterwards, to wit, on the 29th day of August, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's special report in the premises, which report is in the words and figures following, to wit:

United States circuit court, southern dist. of O.

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD Co. *et al.* } In chancery.

Joseph W. Alsop, receiver in this action, respectfully reports to the court that he has borrowed, as such receiver, the sum of ($35,000) thirty-five
180 thousand dollars, and has given therefor his notes as such receiver, of the dates, for the amounts, and payable at the times following, viz:

July 3d,	1861, at	2 months,	due Sept. 6th		$5,042 02
" 4th,	"	3 "	" Oct. 7th		5,068 42
" 1st,	"	4 "	" Nov. 4th		10,210 00
" 1st,	"	5 "	" Dec. 4th		10,210 00
June 20th,	"	6 "	" " 23d		5,135 22

And the receiver further reports that he has given his acceptance, dated Aug. 5th, 1861, at 60 days, due Oct. 7th, for $3,245 55, in renewal of a former note, and has given his note for tires purchased, dated July 15th, 1861, at 3 months, due Oct. 18th, for $1,288 86.

And he further reports that he will, in all probability, be compelled to renew the notes 1st above described, in full or in part, when they mature.

Cin'ti, Aug. 28, 1861.

JOS. W. ALSOP, *Rec'v'r*,
By COFFIN & MITCHELL, *his Attorneys*.

Sixteenth monthly report of receiver.

Afterwards, to wit, on the eleventh day of September, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's sixteenth monthly report in the premises, which report is in the words and figures following, to wit:

Sixteenth monthly report of Jos. W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for July, 1861.

Balance brought down from June ac		$23,414 07
Receipts:		
From passengers prior to July 1st	$3,018 33	
181 " freight and express to July 1st	11,064 98	
" mail service collected do	574 08	
		14,657 39
From passengers on July acc't	12,575 44	
" freight do.	18,346 04	
		30,921 48
" temporary loan (for which the receiver's notes are given, with interest to maturity, in the sum of $35,665 66) to meet extraordinary repairs of Miami bridge, &c., damaged by storm		35,000 00
" other sources		672 26
		104,665 20
Disbursements:		
Paid balance of charges with other roads	$949 96	
" discount, interest, and exchange	101 84	
" note on account of iron purchase	3,226 56	

Paid sundry office expenses	$259 45	
" on account of former arrearages	3,214 25	
" on account of May, current expenses	45,163 25	
" on account of June, do. do.	38,190 32	
" on account of July, do. do.	2,294 44	
		$93,400 07
Balance carried to August ac		11,265 13

JOS. W. ALSOP, *Receiver.*

Entry setting aside default, and allowing Cin'ti to answer.

Afterwards, to wit, on the 12th day of September, A. D. 1861, it being of the special and adjourned term of the court aforesaid for the year last
182 aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI R. R. COMPANY *et al.* } Chancery.

On motion, it is ordered by the court that the default for answer herein be set aside, and leave granted to the city of Cincinnati to file its answer, which is accordingly done.

Answer of the city of Cin'ti.

The answer of the city of Cincinnati, referred to in the foregoing entry, is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY,
THE CITY OF CINCINNATI *et al.*

The answer of the city of Cincinnati to the bill of complaints.

The said defendant, the city of Cincinnati, reserving all and every exception to the many errors and uncertainties and imperfections in the original and amended bills of complaints, and in answer thereto, or so much thereof as she is advised it is necessary for her to answer unto, says, that she admits the execution of the mortgage set forth in the bill of complaints; but she denies that said mortgage or deed of trust is entitled to priority over or constitutes a prior lien upon said Ohio and Mississippi railroad to the claim of this defendant, as hereinafter set forth. She further denies that said mortgage or deed of trust to Marshall O. Roberts and others, styled and known as the first mortgage, con-
183 stitutes a prior lien upon said road to the claim of this defendant.

This defendant, further answering, says, that on the 20th day of March, A. D. 1850, the general assembly of the State of Ohio passed an act entitled "An act to authorize the city of Cincinnati to loan her credit to railroad companies," and thereby authorized said city, upon a vote of a majority of the qualified voters thereof in its favor, to loan the credit of said city, by the issue of negotiable bonds or other forms of obligation or evidences of debt to any amount not exceeding the sum of one million of dollars, to any railroad company or companies which had been or should thereafter be chartered by the general assembly of the State of Ohio, and the termination of which had been or should

be by their respective acts of incorporation fixed at or within the said city of Cincinnati; and by the seventh section of said act it was further provided that it should be the duty of the city council of said city, and it was thereby authorized, to contract with the said companies, and with each of them, to secure by mortgage, transfer, or hypothecation of stocks of the said company's, or by such other lien or liens, security or securities, real or personal, as might be naturally agreed upon by the said council and the said company or companies, the payment of the amount of the principal of such bonds as they should become
184 due, and for the reimbursement to the said city of Cincinnati of the interest upon the same which should be paid by said city; and for the further purpose of securing said city against all loss or losses which the same might suffer, whether by payment of said principal or interest, or any damages arising therefrom, and that the above described liens, mortgages, or other securities should have priority or preeedure of all claims or obligations subsequently contracted by such company or companies, and over other liens, securities, or mortgages which were not duly entered into between said company or companies, and other persons or parties, before the respective issues and loans aforesaid.

And defendant says that afterwards, on the 20th day of September, A. D. 1850, in pursuance of the provisions of said act, the city council of said city did, by resolution, agree to loan to said Ohio and Mississippi Railroad Company (which company had before that time been chartered by an act of the general assembly of the State of Ohio, and also by an act of the general assembly of the State of Indiana, and which railroad connected with and terminated at the said city of Cincinnati) the bonds of said city, in the amount of six hundred thousand dollars, payable thirty years after date, and bearing interest at the rate of six per cent. per annum, payable half-yearly in the city of New York, which loan was to be secured by a mortgage of said road.

185 And afterwards, at an election held in said city on the 8th day of October, A. D. 1850, the question of said loan, in pursuance of the authority conferred by said act of the general assembly, and the terms and conditions prescribed by said resolution, was submitted to a vote of the qualified voters of said city, and a majority of the said qualified voters of said city did vote at said election for a loan of six hundred thousand dollars to said Ohio and Mississippi Railroad Company, upon the terms and conditions prescribed by said act of the general assembly and said resolution of the city council.

And afterwards, on the 29th day of August, A. D. 1851, the said The Ohio and Mississippi Railroad Company formally accepted, in writing, the proposition of said city to make said loan as contained in said resolution, a copy of which said writing acceptance is herewith filed as an exhibit, and made part of this answer.

And thereupon, afterwards, to wit, on the 29th day of August, A. D. 1851, the said city council, in pursuance of the provisions of said act of the general assembly, and the vote of the people, and the said resolution of the city council, and the acceptance of said railroad company as aforesaid, passed an ordinance entitled "An ordinance to provide for the issue of bonds to the Ohio and Mississippi Railroad Company," and thereby authorized and empowered the president of said city council and the recorder of said city, in the name of and
186 for said city, to carry out and execute the condition of said resolution, and to execute, issue, and deliver to the directors of said Ohio and Mississippi Railroad Company negotiable bonds for the sum of six hundred thousand dollars, of $1,000 each, bearing an interest, and payable as specified in said resolution; and for the payment of said bonds and interest the revenues, rights, and faith, and all the real and personal property of said city were thereby pledged forever; and further providing, also, that the said loan should be secured by a mortgage upon said road, in pursuance of the act and resolution aforesaid.

And afterwards, on the 29th day of December, A. D. 1851, and after the said Ohio and Mississippi Railroad had accepted the terms of said loan, the said city council, by an ordinance amendatory of said ordinance passed as aforesaid on the 29th day of August, A. D. 1851, repealed so much of said ordinance as required said loan to be secured by a mortgage upon the road, and provided that before said bonds, or any part thereof, should be delivered over to said company, the said company should mortgage, hypothecate, pledge, and deliver over to said city of Cincinnati one million of dollars of the capital stock of said company.

And this defendant further states that the said Ohio and Mississippi Railroad Company thereupon accepted the said loan upon the terms and conditions
187 as modified by the amendatory ordinance aforesaid; and thereupon, on the 5th day of April, A. D. 1852, the said company placed in the possession of the said city a certificate for twenty thousand shares of their capital stock of the par value of $50 each, and with it delivered to the said city an instrument properly executed, by hypothecating said stock as required by said ordinance of December 29th, A. D. 1851; and thereupon the said city issued and delivered to the said railroad company her bonds, as follows: $100,000 on the 5th day of October, A. D. 1852; $100,000 on the 7th day of December, A. D. 1852; $100,000 on the 2d day of March, A. D. 1853; $100,000 on the 4th day of June, A. D. 1853; $100,000 on the 21st day of June, A. D. 1853; and $100,000 on the 25th day of August, A. D. 1853; all of which bonds were, by said railroad company, negotiated, sold, and transferred to and are now held by parties unknown to this defendant. And this defendant avers that said loan constituted the first and best lien upon said railroad by virtue of the express provisions of the said acts of the general assembly of the State of Ohio and of the State of Indiana, and by virtue of the proceedings and action aforesaid of the said railroad company and the said city of Cincinnati.

Defendant further states that said railroad consists of one hundred and
188 ninety-two miles, running from the foot of Wood street, in the city of Cincinnati, to the city of Vincennes, in the State of Indiana, including large and valuable depot grounds and buildings in Cincinnati, and at other points on said road, with side tracks, &c., all of which this defendant claims is subject to and covered by her said lien.

Defendant further says that on the 13th day of February, A. D. 1851, and long before the passage of said ordinance and the making of said loan, two certain acts amendatory of the charter of said railroad company were passed by the general assembly of the State of Indiana, and approved by the governor thereof; the one authorizing said company to borrow money at any rate of interest that might be agreed on, and to mortgage the railroad, income, and other property of said railroad company in order to secure the same; and the other providing that the several acts of the legislature of the general assembly of the State of Ohio, granting the right of way to said Ohio and Mississippi Railroad Company, or otherwise aiding said company, that has been enacted, should, upon the acceptance of the same by the directors thereof, entered upon their minutes, be taken, considered, and adopted as part of the original act of incorporation of said company.

And this defendant avers that the same were accepted by the directors
189 of said company, and entered on their minutes, and became part of said charter.

And this defendant further says that on 10th day of June, A. D. 1852, and after the passage of said ordinance an amended ordinance of the said city of Cincinnati, and after the acceptance of the same by said company, and after the said company had deposited, pledged, and hypothecated the said stock to this defendant—all of which ordinances and acts became and were matters of public record, and of which the said Marshall O. Roberts, John J. Phelps, and Henry A. Coit, trustees, &c., had full notice—the said company executed and delivered

to said Roberts *et al.*, trustees as aforesaid, a mortgage set forth in the bill of complaints, and called the first mortgage, to secure the seven per cent. bonds of said company to the amount of two million and fifty thousand ($2,050,000) dollars, and all of which was also long before the execution of said second mortgage to said E. D. Mansfield and John McLean, trustees, &c., of all which the said parties had full notice.

And this defendant further states, that at the time of the commencement of the issue and delivery to said company of the bonds of said city, a very small amount, if any, of the bonds of said company secured by said first mortgage had been issued, and no part of the bonds secured by said second mortgage had
190 been issued. This defendant is not advised what amount of said first mortgage bonds had been issued, or at what time the same was issued, but she asks that her co-defendant, the Ohio and Mississippi Railroad Company, may be required to discover the date of the issue and negotiation of the same.

This defendant further states that she has paid the interest upon the said bonds issued by her as aforesaid as the same has become due, and *and* there is now due to her from the said Ohio and Mississippi Railroad Company, on account thereof, the sum of $18,000, with $90 paid for exchange on New York, and interest thereon from July 1, A. D. 1861, which is a valid lien, and the first and best lien upon the said railroad and appurtenances as aforesaid; that said interest, in the form of coupons attached to said bonds, was payable on the first days of July and January in each year, from and after the issue of said bonds, at the Bank of America, in the city of New York and State of New York, and that the principal thereof will be due and payable on the 1st day of January, A. D. 1882.

This defendant therefore prays that the court will protect her interest in the premises, and that her lien upon said road for the said loan may be found and declared by the decree of this court to be the first and best lien thereon, and that the decree heretofore entered in this cause may be opened up and
191 modified in accordance therewith, and for such other and further relief as to the court may seem meet and equitable.

WARE & DISNEY, *Solicitors.*

STATE OF OHIO, *Hamilton County, ss:*

George Stackhouse, being first duly sworn according to law, says that he is the auditor of said city of Cincinnati, duly elected and qualified, and that the several matters and things stated in the foregoing answer and cross bill are true of his own knowledge, except as to the matters stated on information and belief, and as to those he believes them to be true.

GEORGE STACKHOUSE.

[SEAL.] Sworn to before me, and subscribed in my presence, this Sept. 10, A. D. 1861.

GEORGE HATCH, *Mayor of Cincinnati.*

Schedule of real estate, &c., belonging to the O. & M. R. R. Co.

Afterwards, to wit, on the twenty-first day of September, A. D. 1861, there was filed in the office of the clerk of the court aforesaid a schedule of real estate and appurtenances belonging to the Ohio and Mississippi, which schedule is in the words and figures following, to wit:

Schedule of real estate and appurtenances belonging to the Ohio and Mississippi Railroad Company, (eastern division,) Cincinnati township, State of Ohio.

North parts of lots 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, Yeatman and Anderson's subdivision, city of Cincinnati, 25 x 80 feet each, south side Front st.

North parts of lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, Parks' subdivision, S. s. Front

street, east of Wood, each 82½ x 80, except lot No. 9, which is 108 x 80, and 82½ feet of which is leased from C. W. West.

192 North parts of lots 1, 2, 3, Parks' subdivision, west of Wood st. Lot 1 is 58 x 80; lot 2 is 82½ x 80, and lot 3 is 82½ x 80.

North pt. 4, 5, 6, 7 lots in Parks' subdivision, S. s. Front, W. of Wood, each 82½ x 80 feet.

18 feet, S. side Broad st., next W. sect. line; 36 feet S. side Broad, 18 feet W. sec. line, and the buildings. Lots 1, 2, 3, 4, 5, Parks' subdivison, west of Wood. on which depot, &c., used by I. & C. R. R. is now situate.

Lots 1, 2, 3, 4 and 5, Parks' sub., east of Wood, on which depot and freight houses, &c., used by said O. & M. R. R. Co. is situate.

Right of way in the city of Cincinnati, being where the track of said R. R. is now situated, on the south side of Front strt., commencing near the W. line of Mill strt., and running westwardly 3,166 feet to Mill creek. The fee of this property was conveyed by said O. & M. R. R. Co. to the city of Cincinnati, the R. R. co. reserving for their own use the right of way over said ground, sufficient in width for two tracks, and a strip 80 feet wide, extending from W. line of Mill st. to the point of intersection of Third and Front sts.

Storrs township, Hamilton co., Ohio.

Lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, in Thomas' subdivision, 25 feet front.

Lots Nos. 5, 11, 12, 13, 14, 15, 22, each 50 feet front, and lot 31, (100 feet front,) in Bickhaus' subdivision.

193 Lots Nos. 3, 4, 5, 8, 12, 15, (each 30 feet front,) Sedam's and Challen's sub.

3 acres, mouth of Mill creek, over which the road passes, leased for 40 years, from March 1, 1849, at an annual rent of $1,050.

Range.	Town.	Section.	
1	4	30	Small triangle bet. W. W. Canal and east side Pike st. and old pike.
1	4	30	43 x 113 feet N. side old pike, NW. corner Price st., and old pike.
1	4	30	158 feet, more or less, south side old pike, next E. of Colby & Co's. lot, south to Ohio river.
1	4	30	50 feet N. side old pike, next west of Darby lot.
1	4	30	30 feet " " " " last described.
1	4	30	30 feet " " " " " "
1	4	30	43 x 150 ft. south side canal, adjoining 3 last-described lots on the north.
1	4	30	233 feet front, south side old pike, south to section line, and west of Colby's lot, (80 feet by lease.)
1	4	30	Triangle at N. line, sec. 29, south side old pike.
1	4	30	100 feet N. side old pike and sec. line to canal, next E. Jackson's tan-yard. (leased.)
1	4	30	106 feet, No. 7, J. W. Price's sub. on partition, next W. Jackson's tan-yard. Lease 14 years, from Feb'y. 1, 1854.
1	4	30	75 feet west of No. 7, Price's sub., from sec. line N. to canal.
1	4	30	75 feet next west last-named lot.
1	4	30	Triangle 43 by 198 feet, N. by canal, S. by J. Buler

194 *et al.*

Lands in section 29, town. 4, range 1, in Storr's township, Hamilton co., Ohio.

140 feet N. side old pike, triangle at N. line of sec. 29 and old pike, (leased.)

55 feet W. side old pike, 200 feet west of intersection of N. line, sec. 29, and old pike, (leased.)

162 feet, more or less, on Ohio river, back of North's, across old pike to N. line, sec. 29, next east of lot formerly owned by A. Lemmon, (leased.)

157 feet on Ohio river, running back northwardly to W. W. canal, formerly owned by A. Lemmon and Kellog & Kennett, (old Two-mile house,) being NE. corner and SE corner of Green township, on hill road and old pike, (leased.)

107 feet NW. corner of hill road and old pike, formerly Frake's lot, (leased.)

100 feet next west last-described lot, formerly Augusta M. Stome's lot, (leased.)

207 feet from S. s. pike to river; right of way released by Thomas Jackson.

253 feet from south side canal to river, formerly owned by L. Lodwick, (right of way released to co.)

150 feet from S. side canal to river, formerly owned by Wm. E. Childs, (right of way.)

155 feet from S. s. pike to Ohio river, formerly owned by D. F. Goodhue, (right of way.)

100 feet from S. s. canal, 12 ft. N. canal, formerly owned by T. B. Coffin, (right of way released to co.)

195 150 feet from S. S. canal, 12 f't N. canal, formerly owned by Joseph Cox, (right of way.)

50 feet, formerly owned by John Evans, (right of way released.)

150 feet, formerly owned by W. Faeler, (right of way.)

100 feet, S. S. pike, 15 f't N. canal, formerly owned by J. Donovan, p't in sec. 30, (right of way.)

190 feet, S. side pike to Ohio river, formerly owned by L. Kern, (right of way.)

$\frac{3}{4}$ acre in sec. $\frac{34}{35}$, town. 4, r. 1, formerly owned by Elizabeth Yeatman, (sand bank.)

5 acres in sec. 35, (same town and range,) formerly owned by Wm. Oliver Est, at junction of Boldface creek and lower river road, purchased for stone and earth.

On the above lands in Storrs township, Hamilton county, State of Ohio, is situate the superstructure of said O. & M. R. R. side track, switches and turn-outs, depots, turn-tables, engine-houses and shops, &c. &c., and upon and over which said railroad track is now laid. The track of said O. & M. R. R. in said Storrs township, commencing at the present crossing of Mill creek, (near the mouth,) thence running on the south side of the W. W. V. canal over the said lands, and the old pike road to where said road intersects with said canal. Thence following the old tow-path of said canal, (over which said

196 company have the right of way to the line between Storrs and Delhi township, in said Hamilton county, State of Ohio, $2\frac{6}{10}$ miles.

Delhi township, Hamilton county, Ohio.

R. 1, T. 3, sec. 4. 5 acres, from Lower River Road pike to Ohio river, formerly owned by Parcell.

R. 1, T. 3, sec. 29. From 15 feet N. of canal to river, formerly owned by Darby estate, (county own right of way.)

R. 1, T. 3, sec. 10. 112 acres, 55 f't south side canal to Ohio river, formerly belonged to Darby estate, (right of way.)

R. 1, T. 3, sec. 10. $\frac{1}{4}$ acre, 55 feet S. side canal to Ohio river, formerly owned by Darby estate, (right of way.)

R. 1, T. 3, sec. 10. $\frac{1}{4}$ acre.

W. $\frac{1}{2}$ lot No. 3, A. L. Reeder's subdivision, 50 feet front.

E. $\frac{1}{2}$.

W. $\frac{1}{2}$ lot No. 2.

Lot No. 1, A. L. Reeder's subdivision.

Parts lots 22 and 23, D. O. Reeder's subdivision.

R. 1, T. 3, sec. 4. Lot, 5¼ acres.
Lot 24, 50 feet.
W. ½ of N. ½, lot 9, 50 feet front.
N. p't lot 25.
N. p't lot 26.
50 feet wide, south side canal, Home city, from P. Grimes, line to Main street, (right of way)
Lot No. 33, City of Industry.
8¾ miles of track, including side tracks and switches of
197 said O. & M. R. R., is situated in said Delhi township, commencing at the line between Storrs and Delhi townships, on the south side of the W. W. V. Canal, on the tow-path, and following the old tow path of said canal, (over which said R. R. Co. have the right of way,) to the west line of Delhi township, including what ground is cut and covered by superstructure of said R. R., and also all buildings on the same used by said R. R. company.

Miami township, Hamilton county, Ohio.

R. 2, T. 1, sec. 14. 1¼ acres at Upper North Bend, river shore and north line of canal to pike, formerly owned by John Myers and Mrs. Reninger.
R. 2, T. 1, sec. 25. $5\frac{8}{100}$ A. westwardly from N. Bend, (right of way released to company by Guards.)
R. 2, T. 1, sec. 25. 6¾ acres, west of Guards, formerly owned by Dudley, (right of way released)

Station-house at North Bend.

$8\frac{1}{10}$ miles of track and superstructure, and right of way through Miami township, commencing at the west line of said Delhi township, on the old towpath of said canal to North Bend, and where said R. R. leaves said towpath, and from thence westwardly in the direction of down the Ohio river to the Great Miami river; said right of way being 40 feet from the centre of said located track of said R. road as now located and used. Also the right to take gravel from what is known as Gravel Pit, near the line of said R. R. in said town-
198 ship. Also the superstructure shown as the Miami bridge across the Great Miami, near the mouth thereof.

Dearborn county, State of Indiana.

Right of way through said county of Dearborn, commencing on the line dividing the State of Ohio and Indiana near the mouth of the Great Miami, where the track of said O. & M. R. R. is located, and running thence in the direction of the Ohio river to Lawrenceburgh, from Lawrenceburgh to Aurora, from Aurora up Hogan creek to Dillsboro, thence to Moore's hill, and to the line dividing said Dearborn and Riply counties, the distance being, with the meanderings of said R. R., $20\frac{8}{10}$ miles; the said R. R. Co. owning by release or conveyance in fee the right of way a strip (with the exception hereinafter named) of eighty feet in width, being 40 feet each side of the centre of the present located tract of said R. R.

From the Miami bridge to the end of the fill the right of way is 135 feet wide; the track in the centre from that point to Lawrenceburgh, the width of right of way is 100 feet; through Lawrenceburgh the tract is located on William street, by premission of said city; from Lawrenceburgh to Tanner's creek width is 100 feet; from Wilson cr. to Aurora 100 feet; through lands of

Wm. B. Miller, near Dillsboro, 120 feet; between Aurora and Cochran,
199 80 feet; $\frac{3}{10}$ acre p't S. $\frac{1}{2}$ sec. 9, T. 6 N., of R. 3 W., (station-house at Moores Hill.) Deed from Henry J. Bowers, recorded, book 12, p. 97.

Lawrenceburg, Dearborn county, Indiana.

Parts of NW. $\frac{1}{2}$ of in-lots Nos. 70, 69, 68, 67, (not yet fully paid for,) 65, 64. These lots were purchased since the execution of said mortgage for the purpose of erecting depot, and for switch ground.

Aurora, Dearborn county, Indiana.

Parts of in-lots Nos. 264, 265, 270, 271, 275, 278, 281, 284, 285, 280, 287, 291, 292, 297, 313, Walke's ad., s'ct's 54, 48, 46, 47, 77, 78, 101, and 102. The tract through the town of Aurora is laid on and across said lots, and the depot, freight-house, and turn-outs are situated thereon.

Cochran, Dearborn county, Indiana.

Part of sec. 31, town. 5, R. 1, lying east of Hogan creek, and north of the R. R. track, fronting and abutting on the north side of the right of way of said R. R., being at Cochran 80 feet wide, eleven hundred feet, and 480 feet deep, containing 10 acres, conveyed to the company by Geo. W. Cochran, and on which is situate the machine-shops, car-houses, paint-shops, and other buildings, turn-tables, switches, &c., used by said railroad co. On the right of way and lands of said company are also situated the bridges crossing the Miami canal, Tanner's, Wilson, and Hogan creek, and the station-houses at Aurora, Cold Spring,
200 Dillsboro, More's Hill, &c. Right to water from spring at Moore's Hill, conveyed for 99 years, by Levin S. Moore. Deed recorded. Records, Dearborn, book 11, pp. 356–'7. Lease from Morton Justis for right to lay pipe to same, pp. 575–'6.

Ripley county, State of Indiana.

Right of way thro' the county of Ripley, beginning on the line dividing the counties of Ripley and Dearborn, in sec. 29, town. 8 N., R. 13 east, and running thence in a westwardly direction through the villages of Milan, Pierceville, Delaware, Osgood, Poston, and Holton, $21\frac{2}{10}$ miles to the east line of Jennings county, on section 8, town. 8 north, R. 10 east, eighty feet wide, being 40 feet on each side of the present located track of said road, and the bridges and superstructure, &c., and water stations and station-houses at Osgood, &c., &c.; the said company owning the lands on which said R. R. is located to the width aforesaid, and the lands on which the bridges, stations, and water stations and switches are located by contract and conveyance, excepting as hereinafter stated.

Jennings county, State of Indiana.

Right of way through Jennings county, commencing at the west boundary of said Ripley county, near the NE. corner of sect. 1, town. 7 N., R. 10 E., and running thence in a westwardly direction through the villages of Nebraska, Butlerville, Oak Dale, North Vernon, Hardensburgh, with the meanderings
201 of said R. R. $20\frac{9}{10}$ miles to the east line of Jackson co., on section 7, town. 6 N., R. 7 E., in said Jennings co., 80 feet wide, being 40 feet on each side of the centre of the track of said R. R. as now located and used, and the bridges, station-houses, and water stations, &c., on the line of said R. R. now in use; the said co. owning the lands on which said road is located of the width of 80 feet as aforesaid, and the land on which the stations, &c., are situated by

contract or conveyance, excepting as hereinafter stated. Tract of land at Hardinsburg, pt. NW. ¼ sec. 10, T. 6 N., of R. 7 E., conveyed Joseph Ewan. Deed recorded, book W, p. 142. Same—Joseph Ewan—recorded, book W, p. 158.

Jackson county, State of Indiana.

Right of way through Jackson county, commencing at the west line of Jennings co., on sec. 12, town. 6 N., R 6 E., in Jackson co., and running thence in a westwardly direction ($31\frac{1}{10}$ miles) with the meanderings of said R. R. to the west line of Jackson county, on sec 23, town. 4 N., R. 2 E., in said Jackson co., eighty feet wide, being 40 feet on each side of the centre of the track of said R. road, as now located and used, and including the water stations, bridges, switches, station-houses, &c., now used by the company, said r ad running thro' the villages of Seymour, Dunham, Brownstown, Vallonia, Medora, Sparksville, said company owning the land on which said road is located of the width aforesaid, and the lands on which the station-houses, water-tanks, switches, and turn-outs are situated, by contract or conveyance, except as hereinafter named. Land for side track at Vallonia; deed from Thos. Hunsucker; recorded, book O, p. 441; also deeds from R. W. Mead and Sam'l T. Wells for same. Recorded in book O, pp. 443, 444. Land for station-house at Brownstown, $2\frac{72}{100}$ acres. Deed from Wm. H. Ewing, book O, p. 442.

202

Lawrence county, Indiana.

Right of way through Lawrence county, commencing on the line dividing Lawrence and Jackson counties, on sec. 22, town. 3 N., of R. 2 E., in Lawrence county, and run in a westwardly direction through the villages of Fort Ritner, Tunnelton, Scotville, Mitchell, Georgia, and Huron ($25\frac{9}{10}$ miles) to the line dividing Lawrence and Martin counties, on section 6, town. 3 N., of R. 2 W., in Lawrence co., eighty feet wide, being 40 feet on each side of the track of said R. R. as now located, and including the superstructure, water-tanks, station-houses, bridges, switches, and turn-outs now in use; said co. owning the lands on which said road is located, (to the width of 80 feet,) and the lands on which said water-tanks, bridges, station-houses, &c., are located, by contract or conveyance, except as hereinafter stated. Lots in the town of Mitchell, in said county, Nos. 350, 351, 352, on which freight-house stands, 353, 348, 349, 347, 298, 297, 296, 295, 299, occupied by switch and side-tracks, and the lots on which the engine-houses, wood-sheds, and track leading thereto is situate. The width of right of way thro' Mitchell 120 feet wide, on which the turn-table and station-house stands. Land for side-track at Huron from Sewall *et als.*

203

Martin county, State of Indiana.

Right of way through the county of Martin, commencing on the east line of Martin co., at section 1, town. 3 N., of R. 3 W., and running thence in a westwardly direction with the meanderings of the tract of said R. R. through the villages of Willow Valley, Shoals, Logotee, $19\frac{5}{10}$ miles to the west line of Martin co, on section 24, town. 3 N., of R. 5 west, in Lawrence co., eighty feet wide, being 40 feet on each side of the centre of the present located track of said road, including the bridges, water-tanks, station houses, and section-houses; the company owning the lands on which the same are located by contract or conveyance, except as hereinafter named. $2\frac{1}{2}$ acres of land in SE. ¼, sec. 11, town. 3 N., of R. 3 W., at *at* and including Green's spring, conveyed to co. by Stephen Green and wife, Dec'r, 1857. Station and side-tracks at Logotee. Deed from W. S. Crays. Recorded, book 9, p. 268. Same from Thomas Goote, book 9, p. 270.

204

Daviess county, State of Indiana.

Right of way thro' Daviess county, commencing on the line dividing Martin and Daviess counties, on section 23, town. 3 N., R. 5 W., in Daviess co., and running thence in a westwardly direction with the meanderings of the track of said R. R. thro' the villages of Montgomery, Black Oak, Siding, and Washington, $18\frac{2}{10}$ miles to the west line of said county, on sec. 25, town. 3 N., of R. 8 west, in Daviess co., eighty feet wide, being 40 feet on each side of the centre of the track of said road as now located, and including the superstructure, bridges, station-houses, water-tanks, and the lands on which situated, now used in operating said road; the co. owning the said lands by contract or conveyance, excepting as hereinafter stated. Piece of land S. of Second str't, Washington, conveyed by Wm. P. Boyden. Deed recorded, book L, p. 37, records of Daviess co.

Knox county, State of Indiana.

205 Right of way through Knox county, commencing at White river, on the east line of said county, where the R. R. bridge crosses White river, and running thence westwardly thro' the villages of Wheatland and Richland (15 miles) to the R. R. bridge crossing the Wabash at Vincennes, eighty feet wide, being 40 feet on each side of the centre of the present located track of said railroad, including bridges, superstructure, water-tanks, station and section houses; said company owning the lands on which the track is located of width aforesaid, (except as hereinafter stated,) and the lands on which said station-houses, &c., are situated, by deed of conveyance or contract, excepting as hereinafter excepted. $14\frac{3}{10}$ acres of land in Vincennes township, in Knox county, conveyed to said O. and M. R. R. Co. by Abner T. Ellis, by deed, dated 28 April, 1853. Recorded in book S, pp. 525 '6, records of deeds of Knox co.

$25\frac{1}{10}$ acres of land in Vincennes township, lying between the O. & M. R. R. & Bruceville plank road, conveyed to said co. by Pierce Brouillette by deed, dated May 28, 1853, and recorded in records of Knox co., book S, pp. 538, 539. $9\frac{5}{100}$ acres of land near Vincennes, conveyed to said co. by Abner T. Ellis and wife, by deed dated 27th July, 1853, and recorded in the records of deeds of Knox co., book S, pp. 593, 594. Lots in Harrison's addition to the town of Vincennes, Nos. 97, 98, 94, 95, 93, 29, 36, 35, 34, 33, 114, 115, 119,
206 118, conveyed to said co. by George W. Cochran by deed recorded in records of Knox co., book T, pp. 740, 741. Lots in Harrison's addition to the borough of Vincennes, Nos. 125 and 126, conveyed to said R. R. Co. by C. M. Allen, by deed recorded in records of deeds of Knox co., book S, pp. 568, 569.

Also the land on which the turn-table, engine-house, machine-shops and freight-houses and other buildings used by the said R. R. Co. are situated at Vincennes. The bridge across the Wabash river was built by the two divisions of the said Ohio & Mississippi R. R., the eastern division paying three-fifths and the western division two fifths of the cost of erecting the same.

The O. & M. R. R Co. (E. D.) in the State of Indiana passes through 487 tracts of land owned by different persons on the route before described. Through 320 of these tracts the right of way has been conveyed to the company by sufficient deeds of conveyance or obtained by condemnation. Through 54 of these tracts no titles can be found among the papers; over 110 tracts the owners have permitted the road to pass and have executed contracts to convey, but conveyances have not been made. In several instances the contracts to convey are coupled with conditions in regard to fencing, crossings, &c., not yet carried out. The officers of the road, however, have full possession
207 of the right of way, and by the laws of the State of Indiana in such cases the owners of the land cannot take possession thereof, but can

only require the co. to pay value thereof, and damages to the other portions of the land, (if any.)

Length of side tracks and size of buildings belonging to O. & M. R. R., eastern divisions, Cincinnati station.

Side tracks	6,130 feet.
J. & C. fr't depot	200 x 64 "
Platform	36 "
O. & M. fr't and pass'r depot	380 x 61 "
Platform	28 "
O. & M. freight depot	206 x 33 "
Platform	12 "
Car-house	53 x 19 "
Repair-shop	44 x 24 "
Smith-shop	22 x 16 "

Transfer C. H. & D. R. R.

Side track	2,077 feet.

Storr's Station.

Side track	8,673 feet.
Brick house	80 x 30
Round house	100 x 50
Engine house	121 x 30
Engine house	109 x 30
Smith shop	25 x 17
Water station	20 x 20
Turn-table	50 x 12

Cullom's.

Side track	1,750 feet.

208 *Delhi township.*

Side track	1,700 feet.
Depot	16 x 25

North Bend.

Side track	650 feet.
Depot	24 x 16 "
Water station	20 x 20 "

Gravel Pit.

Side track	4,780 feet.
Boarding-house	41 x 25 "
Boarding-house	50 x 18 "
Engine-house	56 x 18 "

Lawrenceburgh.

Side track	970 feet.

Aurora Station.

Side track	1,036 feet.
Side track, (gaffs)	1,000 "
Passenger depot	40 x 20 "
Freight depot	50 x 28 "

Cochran Shops.

Side track	10,959 feet.
Machine-shop	257 x 77
Engine-house	257 x 58
Smith-shop	128 x 46
Paint-shop	180 x 48

Dillsborough.

Side track	932 feet.
House	24 x 20

Cold Springs.

Side track	634 feet.

209 *Moore's Hill Station.*

Side track	1,120 feet.
Depot	120 x 20 "
Water station	20 x 20

Milan Station.

Side track	1,850 feet.

Pierceville Station.

Side track	1,440 feet.

Delaware Station.

Side track	1,300 feet.

Laughery.

Side track	722 feet.
Water station	20 x 20 "
Engine-house	15 x 20 "

Osgood.

Side track	1,366 feet.
Depot	75 x 20

Poston.

Side track	1,512 feet.
Water station	20 x 20

Holton.

Side track	1,080 feet.

Nebraska.

Side track	1,000 feet.

Butlerville.

Side track	1,400 feet.

Oak Dale.

Side track	540 feet.

210 *Muscatatack.*

Water station	20 x 20 feet.
Engine-house	15 x 10 "

North Vernon.

Side track	2,752 feet.
Depot	100 x 20 "

Whitcomb's.

Side track	312 feet.

Hardenburgh.

Side track	1,322 feet.
Depot	24 x 40 "
Tool-house	12 x 16 "

Seymour Station.

Side track	7,172
Transfer shed	233 x 8
4 engine-houses	30 x 60
1 engine-house	34 x 65
Water-station	20 x 38
Machine-shop	18 x 40
Wood-shed	18 x 160
Smith-shop	14 x 68
Boarding house	16 x 24
2 tool-houses	12 x 16
1 sand-house	6 x 8
Passenger depot	24 x 60

Sand Pit.

Boarding-house	24 x 30

211 *Dunham's.*

Side track	1,144 feet.

Crain's.

Side track	365 feet.

Brownstown.

Side track	1,234 feet.
Depot	24½ x 60½
Water station	22 x 20
Boarding-house	24 x 32
Stock pens.	

Vallonia.

Side track	1,080 feet.
Stock pens.	

Medona.

Side track	9,635
Depot	24½ x 60½
Stock pens.	

Sparksville.

Side track	1,110
Depot	41 x 24
Water station	20 x 20

F't Ritner.

Side track	1,184
Stock pens.	

Tunnelton.

Side track	633
Boarding-house	28½ x 16½

212

Scottville.

Side track	1,464
Water station and engine-room	20 x 20

Mitchell.

Side track	2,814
Turn-table.	
Boarding-house	35 x 20
Stock pens	100 x 135
Water station	20 x 20
Depot	24½ x 61
Fr'nt (joint) depot	97 x 31

Georgia.

Side track	1,427

Huron.

Side track	1,115 feet.
Depot	40 x 24
Platform	300 x 8
Stock pens.	

Gran's Springs.

Water station	20 x 20

Willow valley.

Side track	1,115 feet.
Platform	200 "

Shoals.

Side track	1,943 feet.
Depot	16 x 25

Hominy Spring.

Water station	20 x 20

213 *Belle Grade.*

Side track	556 feet.

Loogootee.

Side track	1,428 feet.
Depot	61 x 24½
Stock pens.	

Montgomery's.

Side track	450 feet.

Stevens's.

Water station	20 x 20

Black Oak.

Side track	1,668 feet.
Boarding-house	19 x 21

Washington.

Side track	3,367
Depot	61½ x 24½
Platform	240 x 6
Tool-house	15 x 18
Engine-house	18 x 54
Water station	20 x 20
Engine-room	10 x 20
Stock pens	100 x 100

Elden.

Side track	408 feet.

West Fork.

Section house	17 x 25

Ashcroft.

Coal track	1,705 feet.

214 *Wheatland.*

Side track	975
Depot	40 x 24
Platform	250 x 6

Persell's.

Water station	20 x 20

Richland.

Side track	1,460

Vincennes.

Side track	11,814
Machine-shop	152 x 62
Carpenter "	25 x 62
Store-room	25 x 62
Coppersmith-shop	17 x 18
5 engine-houses	$30\frac{1}{2}$ x $61\frac{1}{2}$
2 "	35 x $60\frac{1}{2}$
1 "	$30\frac{1}{2}$ x $85\frac{1}{2}$
Sand-house	10 x 12
Brick engine-room	15 x 40
Turn-table	50
Water station	20 x 20
Fr't depot	85 x 24
" (joint)	81 x 16
(2) two tool-houses	10 x 10
Stock pens	235 x 150

215 216 *Engines belonging to the company, July* 1, 1860.

No.	Builder.	Remarks.
1	Danforth & Cook.	In good order; has been rebuilt, 1860.
2	".....".	" " " has had new set tires.
3	Niles & Co.....	Will require new set tires soon; otherwise in good order.
4	....."	In shop, front sheet needs repairs; otherwise in good order.
5	....."	In good order.
6	....."	" " "
7	....."	" " "
8	....."	" " " has been rebuilt, 1860.
9	....."	Has had gene'l repairs during the year.
10	....."	Needs slight repairs.
11	....."	In bad order; needs gen'l repairs and new tires.
12	....."	Needs slight repairs.
13	....."	In good order, has had gen'l repairs.
14	....."	" " "
15	....."	" " "

Engines belonging to the company—Continued.

No.	Builder.	Remarks.
16	Niles & Co.....	Frame broken; otherwise in good order.
17	.....".....	In good order.
18	.....".....	" " "
19	.....".....	" " "
20	.....".....	" " "
21	.....".....	In bad order; needs gen'l repair and new tires.
22	Smith & Jackson..	In good order.
23	.....".....	" " "
24	.....".....	In shop for slight repairs; otherwise in good order.
25	.....".....	In good order; has new set tires this year.
26	.....".....	In shop, undergoing rep's; needs one new cylinder, new set tires.
27	.....".....	In good order.
28	.....".....	" " "
29	.....".....	Needs new set of tender trucks.
30	Danforth & Cook.	In shop for slight repairs.
31	.....".....	" " " repairs of boiler.
32	Smith & Jackson.	In good order.
33	.....".....	" " " new tires.
45	O. & M. R. R....	" " "

Cars belonging to the company.

First-class passenger cars	27
Second " " smoking cars	4
Baggage cars	10
House cars	216
Stock cars	71
Flat cars	78
Short flat cars	12
Coal cars, inside bearing	10
Gravel cars	51
Ditching cars	12

217	Machinery, tools and materials at Cochran shops, estimated at	$24,000
	Machinery, tools and materials at Vincennes shops, estimated at	12,000
	Do. do. do. at Storrs & Seymour	5,000
	Road tools and materials in hand of foreman	34,000
		75,000
	Furniture in the offices and stations, say	$1,500
	Telegraph line 192 miles, at $100 per mile	$19,200

Seventeenth monthly report of receiver.

And afterwards, to wit, on the seventh day of October, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's 17th monthly report in the premises, which report is in the words and figures following, to wit

Seventeenth monthly report of Joseph W. Alsop, receiver of the Ohio & Mississipi Railroad Company for August 1861.

balance brought from July account		$11,265 13
RECEIPTS.		
From passengers, prior to 1st August	$2,681 43	
" freight and express do	9,511 83	
" mail pay to June 30, 1861	10,283 85	
		22,427 11
" passengers on August acc't	16,110 90	
" freight " "	13,606 56	
		29,717 46
" balance on charges advanced to other roads		141 67
" other sources		211 10
		63,762 47
DISBURSEMENTS.		
Paid on account of repairs on Miami bridge	$8,000 00	
" discounts, interest and exchange	363 06	
" sundry office expenses	121 31	
" on account of former arrearages	1,191 08	
" on acc't of July current expenses	16,347 00	
" of first-mortgage coupons due Jan'y 1, 1860	560 00	
" of first-mortgage coupons due July 1, 1860	8,435 00	
		34,845 45
Balance carried to Sept'r. acc't		28,917 02

JOS. W. ALSOP, *Receiver.*

Entry staying the sale of the O. & M. R. R., &c.

Afterwards, to wit, on the 19th day of October, A. D. 1861, it being of the October term of the court aforesaid for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO & MISSISSIPPI RAILROAD COMPANY & OTHERS. } Chancery.

On motion to the court by Charles E. Whitehead and T. Ball, esqs., solicitors, George Peabody and others, it is ordered that the sale of the railroad and other property advertised by the said Mansfield and Hoadly trustees, for the 21st day of October, 1861, be stayed until the further order of this court.

Petition, affidavit, &c., of Geo. Peabody & Co.

Afterwards, to wit, on the 21st day of October, A. D. 1861, there was filed in court here the petition, affidavit and notice, on motion of George Peabody
219 & Co., which petition &c., is in the words and figures following, to wit:

Circuit court of the United States for the southern district of Ohio.

EDWIN D. MORGAN, GEORGE D. MORGAN, JOHN T. TERRY, and SOLON HUMPHREYS, partners under the name of E. D. Morgan & Co., and others,

vs.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY; Edward D. Mansfield and George Hoadly, trustees; Marshall O. Roberts, John J. Phelps and Henry A. Coit, trustees; Edwin Bartlett, David Hoadly and G. S. Robbins, trustees; The city of Cincinnati, Jethro Mitchell, Richard W. Keys, Samuel Wann, and Hugh McBirney, partners under the name of Wann & McBirney, Henry Hanna, Peter Zinn, D. T. Goodhue, S. G. Gibhart & Co., and others.

} Chancery.

To the honorable the circuit court of the United States for the southern district of Ohio, in chancery:

The petition of George Peabody, of the city of London, in England, James Spencer Morgan, of the same city, and Charles Cubitt Gooch, of the same city, composing the firm of George Peabody & Co., of the said city, bankers, respectfully showeth:

That the above-named defendants, the Ohio and Mississippi Railroad Company, is a corporation duly organized; that in the month of June, 1855, it had
220 issued and there were then outstanding against it what are usually called its first-mortgage bonds for the eastern division of said road, to the amount of two millions and fifty thousand dollars, each bearing date with the said mortgage, May 24, 1852, to each of which bonds coupons in the usual form for the semi-annual interest were attached, the said interest being payable in the city of New York on the first day of January and the first day of July in each year respectively; that some of the said bonds were held in the United States, but by far the largest amount of them was held in Great Britain; that in consequence of pecuniary embarrassments the said railroad company were unable to provide for the payment of the coupons for the interest to become due on the first day of July, in the said year 1855; and inasmuch as your petitioners had aided in the negotiation of the said bonds in Great Britain, the said railroad company applied to your petitioners for assistance in regard to paying or arranging the said coupons, and the president of the said company wrote and sent to them for that purpose a letter, of which the following is a copy:

"NEW YORK, *June* 13, 1855.

"GEORGE PEABODY, Esq.:

221 "DEAR SIR: Shortly after the return of Mr. Tinker, I wrote, at the request of Mr. Bacon, to Mr. Lampson with reference to the interest on the first-mortgage bonds of the Ohio and Mississippi railroad falling due in July and January next.

"I explained to Mr. Lampson very fully the position of the road, and the reasons that induced it to ask this further favor from the English bondholders, and I cannot now add anything to what I then said.

"The proposition was briefly that the bondholders should withhold their coupons for one year, provided the company in the mean time continued work upon the road, so as to warrant the bondholders in assuming that it would be finished without further delay. The security offered was that afforded by the coupons themselves, in every respect better than any new security within the power of the company. I also suggested that if the work should at any time be stopped, then that the bondholders should be at liberty at once to proceed under the mortgages.

"By the last mail, Mr. Lampson advised me that there was no hope of obtaining any further aid from the bondholders, and I am only induced to write to you on a subject that I know must be distasteful, by reason of a letter
222 received this week from Mr. Hall, the president of the company, in which he repeats that the ability of the company to proceed with work upon the road depends almost entirely upon the success of this negotiation.

"Under Mr. Bacon's personal supervision, the western division is rapidly approaching completion, and I have no reason to doubt that it will be in successful operation to Vincennes within three weeks from this time.

"The eastern division has obtained the loan of half a million of dollars from Cincinnati, $100,000 of which have already been paid to the company. The balance is to be paid in monthly instalments of $100,000 each, and this amount is likely to be sufficient to enable the company to keep their present force of about one thousand men at work upon the road; but before receiving an instalment from the city, the company is obliged to show that the whole amount of the previous one has been actually expended upon the road. This leaves the company without one dollar for interest, and they have no present resources of any nature whatever.

"Since the city granted this aid, the credit of the company has gradually revived, so that they have no great difficulty in carrying their floating debt,
223 and Mr. Hall and myself are now negotiating with some of the roads connecting with this, for a loan of a million of dollars, which will enable us to finish the road within eight months.

"Mr. Hall thinks there is little doubt of our ability to obtain this aid, and a committee of the Miami road are now engaged in considering the proposition. The county bonds to which I referred in my letter to Mr Lampson are still unsold, though we hope to negotiate them in Germany.

"Under these circumstances it will be almost impossible for the company to pay the interest about falling due. The western division will be entirely without means for a number of months to come, and to attempt to meet the interest on the bonds of the eastern division will oblige the company to stop work, will deprive it of further aid from the city, and will at once destroy the credit of the road, so that it cannot keep its large floating debt creditors quiet. In a word, it must result in the most disastrous embarassment, if not in complete ruin.

"In this emergency, the company again appeals to your generosity to save them from utter prostration. All that is asked is time upon these cou-
224 pons, and I am convinced that the bondholders will obtain their interest much earlier and easier by acceding to this request than by adopting the most stringent measures for immediate foreclosure.

"The mere neglect of the bondholders to pursue their legal remedies is not sufficient. The credit of the company would in this case be ruined as effectually as if a foreclosure were commenced. It must be understood that the company have provided for a definite time for their interest. If the bondholders are so numerous that they cannot readily be consulted, it may be possible to effect a loan, for the period stated, with the coupons as collateral; I am certain that they will be considered a perfect security by any one acquainted with the present position of the road.

"In case of a loan, the company would give notes at seven per cent. per annum, with a proper commission; or if the coupons are simply withheld, they would of course bear interest from the time they became payable. I have conversed very freely on the subject of this interest with our mutual friend, Mr. Sherman, and I think he will unhesitatingly advise the bondholders to accept the proposition of the road, and I have no doubt that he will also confirm my
225 statement that they cannot in any other manner obtain payment so speedily, nor without endangering their securities to such an extent as to render an ultimate foreclosure absolutely necessary.

"I am sorry to trouble you, on so stale and unprofitable a matter, with so long a letter; but I trust you will excuse me. I remember with great pleasure your kindness while I was in London, and hope to have an early opportunity of reciprocating it in New York. In common with your many friends in this city, I trust you may soon find time to pay the oft-promised visit to your native country.

"Yours, very truly,

"SAMUEL L. M. BARLOW."

As in and by the said letter will fully appear, and which your petitioners are ready to produce.

That the negotiation opened with your petitioners resulted in a reference of the whole matter, with full instructions, to the correspondents of your petitioners in the city of New York, Messrs. Duncan, Sherman & Co., of the said city, who held various communications with Mr. Barlow, the president of the said company, and with Messrs. Ellis & West, a committee on behalf of the said company, who were fully authorized and empowered to act in its behalf, and that on the thirtieth day of June, 1855, the said president of the company
226 wrote and sent to Messrs. Duncan, Sherman & Co. another letter upon the same subject, of which the following is a copy:

"JUNE 30*th*, 1855.

"GENTS: I find that Judge Ellis and Mr. West are utterly unable to make any arrangement for the payment of the July interest on the 1st mort. bonds. They can only offer the coupons with the Co.'s notes as collaterals, which no one here has interest enough in the bonds to take, though the security is ample.

"I have easily arranged on the same basis to borrow money on the western div'n, but in that Bacon and all his friends are interested. I regret that this protest of the coupons has been found necessary, as the parties are all sanguine that their plan to raise the million of dollars cash could have been carried out successfully in a few days, if this interest were provided for, and this default will render a foreclosure of the 1st mort. inevitable. Judge Ellis and Mr. West will probably go home to-night or to-morrow.

"Yours, truly,

"SAMUEL L. M. BARLOW.

"Messrs. DUNCAN, SHERMAN & Co."

As in and by the said last mentioned letter now in their possession, and
227 ready to be produced and proven, will fully appear.

Your petioners further show, that the negotiation was not broken off by the said communication, but was continued with all the parties so representing and acting on behalf of said company, and finally resulted in an agreement in writing made by the said Duncan, Sherman & Co., on behalf of your petitioners, by and with the approbation of the said president of the said company, and Messrs. West and Ellis, on its behalf, they and each of them being duly authorized to make and enter into the same for and on behalf of said company, of which the following is a copy:

Memorandum of an agreement made in New York this third day of July, A. D. 1855, between George Peabody & Co., of London, bankers, party of the first part, the Ohio and Mississippi Railroad Company, a corporation chartered by the States of Ohio and Indiana, party of the second part, and Abner T. Ellis and Charles W. West, both of the city of Cincinnati, parties of the third part.

Whereas the party of the first part heretofore assisted in the negotiation and sale of the first-mortgage bonds of the parties of the second part, commonly known as the first-mortgage bonds of the eastern division of the Ohio and Mississippi railroad, in the city of London;

And whereas the parties of the second part, by reason of their em-
228 barrassments, have been unable to provide for the payment of the coupons on said bonds due on the 2d of July, current;

And whereas the party of the first part is willing, by reason of the part they had in negotiating said bonds, to purchase the said coupons, in order that the credit of the party of the second part may not be further injured by their going to protest, and to hold them for sixty days, to be further extended four months in case certain arrangements for completing the road now in progress are carried out, the parties of the second part paying interest on said coupons at the rate of seven per cent. per annum from maturity till payment, and giving certain further security as hereinafter provided;

And whereas the parties of the second part are engaged in perfecting arrangements for completing their road, and the parties of the third part have agreed to undertake to procure good individual security to the amount of twenty thousand dollars, towards purchasing the said coupons of the party of the first part hereafter, with the expectation on their part that such arrangements will be completed;

And whereas the second parties have hypothecated to James Lee & Co. a number of Knox and Davies county bonds to secure certain advances made on them by said James Lee & Co., and have this day made an assignment of all
229 the said county bonds, subject to said advances, to Messrs. Duncan, Sherman & Co., agents for the party of the first part, as part of the additional security to be given under the terms of the agreement herein recited, and the said Duncan, Sherman & Co., as such agents, have this day purchased a large nnmber of such coupons on the behalf of the party of the first part, by virtue of this agreement, before the same could be reduced to writing:

Now, this memorandum witnesseth, that the first party hath undertaken and undertakes to purchase such coupons of said first-mortgage bonds, to the amount of fifty thousand dollars in all, including those already purchased; and that when the parties of the third part shall furnish the note or notes for twenty thousand dollars, hereafter provided for, said note or notes shall be discounted, and the whole proceeds applied to the further purchase of said coupons of said issue; and that they will not present for payment the coupons purchased until the expiration of sixty days; and that in case the said arrangements shall be then perfected, they will not present them for payment until the expiration of four months from that time, and will in that event also permit the parties to the said note or notes to renew the same for four months; and that if the said note or notes shall be paid by the makers or endorsers thereof, and the whole purchase
230 money of all the coupons purchased by the first party shall be reimbursed, with interest as aforesaid, they will deliver said coupons to said third parties, and also all collaterals which they may then hold, to secure the reimbursement of the money expended in said purchase.

Said second parties undertake to complete the arrangements for finishing their road; ratify and confirm the assignment of the said Knox and Davies county bonds to the first party, subject to said advances; agree to pay interest on the said coupons to whomsoever may hold them, as if presented and protested, and assent to the transfer, both of them and the remaining collateral, for the benefit of the parties to the said note or notes for twenty thousand dollars, whenever the first party shall be fully reimbursed, principal and interest. Said third parties agree to endeavor to procure, as soon as possible, a note or notes for twenty thousand dollars, signed by themselves and other directors of the said Ohio and Mississippi Railroad Company, and satisfactory to Duncan, Sherman & Co., payable at the office of Duncan, Sherman & Co., in New York, in sixty days, and present the same to them for discount, the proceeds to be applied as above, and to do the same in case of renewal, as above provided for, the renewal note to be equally satisfactory to Duncan, Sherman & Co.

231 In witness whereof, the parties have hereunto set their hands and corporate name, respectively, the party of the first part by Duncan, Sherman & Co., their agents duly accredited; the party of the second part by Abner T. Ellis and Charles W. West, members of the financial committee of the board of directors of said corporation, duly authorized; and the parties of the third part, each by his own hand, signed and interchanged in presence of J. C. Bancroft Davis.

(Signed) GEORGE PEABODY & CO.,
By DUNCAN, SHERMAN & CO.
(Signed) THE OHIO & MISSISSIPPI RAILROAD CO.,
By ABNER T. ELLIS, C. W. WEST,
Of the Finance Committee.
ABNER T. WEST.
C. W. WEST.

As in and by the said agreement, ready to be produced and proven as this court shall direct, will fully appear.

That on the sixth day of July, 1855, the said president of the said company wrote and sent to said Duncan, Sherman & Co., on behalf of and as the agents of your petitioners, another letter, of which the following is a copy:

"NEW YORK, *July 6th*, 1855.

"GENTS: Judge Ellis and Mr. West left for Cincinnati this morning, very confident in their ability to secure the necessary sum to complete the eastern division of the O. and M. railroad by subscriptions, under the arrangement about which I have already informed you. I believe that they have already
232 obtained $700,000, from parties abundantly able to pay, and they say there is no doubt of their success in getting six other persons or companies to join in the subscription at the rate of $50,000 each.

"A million of dollars obtained in this way, in addition to the $300,000 to be received from the city of Cincinnati, will finish the road within eight months, beyond any question whatever. The Co. may be obliged to make arrangements for their interest due in October, but I think that they will have no difficulty in doing so, as these bonds are chiefly held in New York. The actual opening of the western division to Vincennes will alone give an impetus to the work on this road, and will so much strengthen their credit that I do not allow myself to doubt that the whole line will be open in less than a year, and I believe that the stock will be as valuable as that of any road in the Union.

"On the whole our present position is in every respect good, and with a total re-organization of the board in Cincinnati, with a new president and engineer, all our western friends say that we are sure to succeed in finishing the road; and if we do not fail in consummating our present plan, our success will be entirely owing to the generous and timely aid of your firm in coming forward on Tuesday last and enabling the Co. to pay its interest.

233 "If our coupons had gone to protest we should not have been able to obtain another dollar from the city; our floating debt, which is large, would at once have been called in, and the destruction of our credit would have entirely prevented the success of the plan by which we are now likely to realize a sum sufficient to complete the road.

"I am satisfied that your action in this matter has been of the most essential service, not only to the company, but to the first-mortgage bondholders. If this interest had remained unpaid they would certainly, in some shape or other, have been obliged to expend nearly the whole sum necessary to build the road. The second bondholders would have contributed something, but the burthen would have been thrown upon the holders of the first-mortgage bonds, and they could not have avoided the necessity of this further large advance by a fore-

closure; for though I know that the road is now worth very much more than the amount of the first bonds, yet I am convinced that on a foreclosure in its present unfinished state, it would not sell for the amount of that mortgage, unless the holders of those bonds became the purchasers; and if the company can finish it at a cost of $1,300,000, you may safely calculate that the cost to the bondholders would be doubled.

"The committee from Cincinnati were particularly anxious that I should express to your firm their satisfaction and thanks for your generous assist-
234 ance, and I hope and believe that the company will now be able to complete this great work without being obliged again to appeal to the generosity of our friend Mr. Peabody.

"Yours, very truly,

"SAMUEL L. M. BARLOW.

"Messrs. DUNCAN, SHERMAN & Co."

As in and by the said letter now in the possession of your petitioners, and ready to be produced and proven as this court shall direct, will fully appear.

Your petitioners further show that the said agreement was fully carried out and performed by them in all respects; that all the said coupons, so due on the first day of July, 1855, and presented, were purchased and taken up by them under and in pursuance of the said agreement, and the full amount due paid thereon; that the company and the other parties to the said agreement, however, never gave the additional security which it was to provide by a note or notes of twenty thousand dollars as mentioned in the said agreement, according to its terms, or in any other way, but have hitherto wholly omitted so to do, and that the said Knox and Daviess county bonds, mentioned in the said agreement as being pledged to James Lee & Co., have proved wholly worthless to your petitioners as security, by reason of the prior claim for advances thereon by said James Lee & Co., and the worthless character of the said bonds; that
235 the amount so disbursed by your petitioners to purchase and take up the said coupons was the sum of sixty-eight thousand one hundred and forty-five dollars, all of which still remains due and unpaid to them, with interest since the said first day of July, 1855, and that your petitioners have no security therefor except such as is furnished by the said agreement, and the responsibility of the said company, which is represented to be, and your petitioners believe is, insolvent.

Your petitioners further show, that in the year 1856 some of the holders of the said first-mortgage bonds agreed to capitalize all the interest then due and to become due thereon up to and including July 1, 1858, and the said company deemed it desirable that all should do so; that the said company again invoked the assistance of one of your petitioners, their senior partner, the said George Peabody, to aid them in making that arrangement, and he consented to furnish the same, and on the 17th day of April, 1856, at the city of London, at the request of the said Barlow, as president of the said company, made and entered into an agreement with the said company upon that subject in the form of a letter, signed by the said George Peabody, and addressed to the said Barlow, of whic . the following is a true copy:

236 "LONDON, *April* 17, 1856.

"SAMUEL L. M. BARLOW, esq.:

"DEAR SIR: Many of the holders of the first-mortgage bonds of the Ohio and Miss. Railroad Company have already acceded to the terms proposed in your letter to my firm of the 9th instant for the capitalization of all interests to and including January 1, 1858, and in order to enable you to complete the other necessary arrangements on behalf of Mr. Aspinwall and his associates, I hereby guarantee and agree that all the holders of the 1,943 bonds sold in Eu-

rope shall accept these terms, and fund all their coupons for the period stated; and in case any of the holders of these bonds refuse to assent to this arrangement, I agree to save the company harmless against any proceedings that may be taken thereon. It is understood that this agreement shall in no way affect my present rights in regard to the collateral placed in my hands to secure a loan made by me to the company in July last.

"Yours, very respectfully,

"GEORGE PEABODY."

As in and by a duplicate of the said letter, in the handwriting of the said Barlow, subscribed by the said George Peabody, now in his possession, will more
237 fully appear, and which your petitioners now offer to produce and prove.

Your petitioners further show, that no other agreement was ever made upon any of the subjects embraced in the said last-mentioned letter by the said George Peabody, except such as is contained therein, and that no agreement whatever, upon that subject, was made by the said firm of George Peabody & Co.

Your petitioners further show, that owing to the embarrassments which they knew the said company was laboring under they have not hitherto pressed for the payment of the said coupons, or the interest thereon, in the hope that the said company would be able to pay the same and perform the agreement with your petitioners in that behalf; and that for the same reason they have not foreclosed the said first mortgage, by which the said coupons were secured, nor called upon the trustees named in the said first mortgage to foreclose the same, nor have the said trustees taken any steps or done anything to that end at the instance or request of your petitioners; that your petitioners have learned since the 1st day of August, 1861, in London, that Edwin D. Morgan and others, the plaintiffs in this action, who are holders of bonds given under and secured by a second mortgage given by the said company, had obtained a decree in the above-entitled suit in this court for a foreclosure and sale of all the
238 property embraced in the said mortgages, on or about the 26th day of April, 1861; and upon procuring and examining a copy of the said decree by their counsel in the city of New York, they find that the said coupons, so taken up and held by your petitioners under the said agreement, are not provided for in the said decree in any manner, nor is any notice taken thereof, or of the claim of your petitioners thereon, or for the interest thereon, but that, on the contrary, the same and every part thereof is or may be excluded by the declaration in the said decree, that the interest on all the said first mortgage bonds had been paid except the sum of $215,145 00, and by the other declaration therein contained, that the said company made default in the payment of the interest due on the said mortgage bonds on the first day of October, 1855, &c.; that the said decree was obtained without the knowledge or procurement of your petitioners, and they were not parties thereto or to the said suit, to their knowledge or belief; that they were not served with any process or notice in the said suit, nor did they know of the same, nor have they nor any one of them ever appeared therein, in any manner or form, to their knowledge or belief, nor have they or either of them ever authorized any one to appear for them therein, or for any one of them; that if the trustees
239 of the said first mortgage ever appeared in the said suit, it was without any request or knowledge of your petitioners, or any one of them, and that if they permitted the bill of complaint therein to be taken as confessed, as would appear by the said decree to be the case, the same was done without any request from or notice to your petitioners, and that not having seen the pleadings in the said suit, or any of them, nor any of the papers therein except the said decree, they cannot at present set forth under what circumstances the said decree was obtained; that the said trustees should have set up the claims of your petitioners upon the said coupons if they were authorized to represent

them in any form, and that their omission so to do was a neglect of duty as to your petitioners; that if the said decree is permitted to stand in its present form, it may be claimed that it operates as an estoppel upon the claims of your petitioners upon the said coupons and the said agreement, and if the sale should take place, provided for by the said decree, the said claims of your petitioners would be excluded thereby, and the purchaser under the said sale would take the mortgaged property discharged of the claims of your petitioners upon the said coupons, all which would be productive of injustice to your petitioners, and would be contrary to equity and good conscience.

240 Your petitioners further show, that they have proceeded with the utmost diligence, since they ascertained the making of the said decree, to communicate with counsel in New York, and to direct proceedings to be taken to have the said decree opened and the rights of your petitioners protected in such way and manner as may be agreeable to equity.

Your petitioners therefore pray that the order or orders taking the bill of camplaint in the said suit as confessed by the trustees of the said first mortgage may be vacated as to them, and that your petitioners may be allowed to appear in the said suit as defendants, and to answer therein and set up the matters hereinbefore stated, and to claim therein their rights and equities in the said suit as to the said coupons so taken up by them under the said agreement, and the amount due thereon for principal and interest as mortgagees under the said mortgage bonds, or as *cestui que trusts* under the said trust mortgage, or that the said trustees under the said first mortgage be directed so to appear and answer and set up such rights and equities, or that your petitioners may be at liberty to do it in their names if they decline so to do; that so much and such parts of the said decree as is repugnant to or conflicts with the said rights

241 and equities of your petitioners may be stricken out, and that in the final decree in the said suit your petitioners may be declared and adjudged to be holders and owners of the said coupons, and entitled to a lien for the amount thereof upon all the property embraced in the said first mortgage, to the same extent and with the like effect as is provided for in regard to the other interest remaining due on the said bonds; or that so much and such parts of the said decree as is repugnant to or conflicts with the rights and equities of your petitioners may be stricken out, and all proceedings on the said decree be stayed, and that your petitioners may be permitted to file their original bill in this court, setting up their said rights and equities and claiming such lien as aforesaid, and impleading therein all the parties to the said decree in such manner as may be agreeable to equity, or that your petitioners may have such other relief as to this court may seem meet and agreeable to equity. And your petitioners will ever pray, &c.

GEORGE PEABODY.
J. S. MORGAN.
C. C. GOOCH.

CONSULATE OF THE UNITED STATES OF AMERICA, *Dundee*.

I, Hugh Smith, consul of the United States of America for Dundee and dependencies in the kingdom of Great Britain, do hereby certify that on

242 this 19th day of September, 1861, George Peabody, of the city of London, England, one of the above-named petitioners, to me known, appeared before me in person, and being by me duly sworn, did depose and say that he had read the preceding petition and knew the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

[SEAL.] In testimony whereof, I have hereunto set my hand and seal of office in aforesaid on the day and year above written.

Pro HUGH SMITH, *A. Bfr.*

CONSULATE OF THE UNITED STATES OF AMERICA,
London.

I, Freeman H. Morse, consul of the United States of America for London and the dependencies thereof, do hereby make known and certify to all whom it may concern, that on this the twentieth day of September, 1861, before me personally appeared and came Junius Spencer and Charles Cubitt Gooch, to me known to be the petitioners above named, and having been by me duly sworn, did depose and say that they had read the preceding petition and knew the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated to be on information and belief, and as to
243 those matters they believe them to be true.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my seal of office, at London aforesaid, the day and year above written.

F. H. MORSE.

Circuit court of U. S. for southern district of Ohio.

EDWIN D. MORGAN, GEORGE D. MORGAN, JOHN T. TERRY, and SOLON HUMPHREYS, partners under the name of E. D. MORGAN & Co.,

against

THE OHIO & MISSISSIPPI RAILROAD COMPANY, EDWARD D. MANSFIELD and GEORGE HOADLY, trustees; Marshal O. Roberts, John J. Phelps, and Henry A. Coit, trustees; Edwin Bartlett, David Hoadly, and G. S. Robbins, trustees; the city of Cincinnati, Jethro Mitchel, Richard W. Keys, Samuel Wann, and Hugh McBirney, partners, under the name of Wann & McBirney; Henry Hanna, Peter Zinn, D. T. Goodhue, S. G. Gibhart & Co., and others. } Chancery.

UNITED STATES OF AMERICA,
City and County of New York, ss:

Wm. Curtis Noyes, of the said city and county, being duly sworn, deposeth and saith he is an attorney and counsellor of this court, and resides in said city; that he was employed in behalf of Messrs. George Peabody & Co., of Lon-
244 don, in this matter, on or about the 30th day of August, 1861, and after consultation with their agent in said city, advised and immediately drew the petition which forms a part of the annexed papers, and had a copy thereof sent to London for verification on the 4th day of September, 1861; that the same was returned to defendant with such verification on the 8th day of October, 1861; that deponent had the same immediately put in the hands of the printer, in order to multiply copies thereof for service, with notice of presenting the same for the third Tuesday of October instant, and that he intends to have the same served as soon as possible after the same shall have been printed; that deponent believes due diligence has been used to prepare, verify and serve the said petition since deponent was so employed, and that the reason why the said notices will be served so short a time before the day named is, that the defendant could not procure the papers and get them ready at any earlier time. And further this deponent saith not.

WM. CURTIS NOYES.

[SEAL.] Sworn to and subscribed before me Oct 9, 1861.

DAVID W. PRICE,
Notary Public, New York City.

Circuit court of U. S. for southern district of Ohio.

EDWIN D. MORGAN, GEORGE D. MORGAN, JOHN T. TERRY, and SOLON HUMPHREYS, partners, under the name of E. D. MORGAN & Co., and others,

against

245 THE OHIO AND MISSISSIPPI RAILROAD COMPANY, EDWARD D. MANSFIELD, and GEORGE HOADLY, trustees; Marshal O. Roberts, John J. Phelps, and Henry A. Coit, trustees; Edwin Bartlett, David Hoadley, and G. S. Robbins, trustees; the city of Cincinnati, Jethro Mitchell, Richard W. Keys, Samuel Wann, and Hugh McBirney, partners, under the name of Wann & McBirney; Henry Hanna, Peter Zinn, D. T. Goodhue, S. G. Gibhart and others.

} Chancery.

GENTLEMEN: A petition, of which the preceding is a copy, will be presented to this court at Cincinnati, Ohio, on the third Tuesday of October, 1861, at the opening of the court on that day, or as soon thereafter as counsel can be heard on behalf of the petitioners, George Peabody & Co.; and thereupon, and upon such other papers as may be received from you in the mean time, and upon the bill of complaint, answers, orders, decrees, and all other papers and documents on file in this suit, a motion will be made for the relief asked in the said petition, or for such other relief or order as the court may deem meet.

Dated Oct. 9, 1861.

Yours, &c.,

NOYES & TRACEY,
Sol'rs for George Peabody & Co.

To all the parties in the above-entitled suit, and to their respective solicitors, and to S. L. M. Barlow, esq., pres't Ohio and Miss. R. R. Co.; to the clerk
246 of said court; to N. C. McLean, esq., sol'r for complainants, and to Ward & Ramsey, sol'rs for Goodhue; to Ware and Disney, sol'rs for the city of Cinc'i; to King & Thompson, sol'rs for R. W. Keys; to Edward D. Mansfield, George Hoadly, trustees, in person; to Peter Zinn, in person; to Charles Fox, sol'r for John Bates; to John W. Herron, sol. for Henry Hanna.

UNITED STATES OF AMERICA,
City and County of New York, ss:

Daniel J. McCaffrey, of said city, being duly sworn, doth depose and say that he did, on the 11th day of October, 1861, serve the annexed petition, affidavit, and notice of motion upon the following named persons: E. D. Morgan, G. D. Morgan, Marshal O. Roberts, Henry A. Coit, David Hoadly, Samuel L. M. Barlow, and Charles Gould, named as parties in the said petition, at their respective offices, with the exception of H. A. Coit, whom I served at his house, No 55 Clinton place, said services being made in the city of New York, by delivering to and leaving with persons in charge of said parties' (plaintiffs and defendants) offices, and a person in charge of said Coit's house, true copies of said petition; and further saith not.

D. J. McCAFFREY.

[SEAL.] Sworn to before me this 11th day of October, 1861.

DAVID W. PRICE,
Notary Public, New York City.

UNITED STATES OF AMERICA, *State of Ohio, ss:*

247 Charles E. Whitehead, being duly sworn, deposeth and saith that on the 15th day of October, 1861, he served the annexed petition, affida-

vit, and notice of motion on N. C. McLean, solicitor for the complainants, and on the clerk of the United States court for the southern dis't. of Ohio, both in person, by handing to and leaving with each a true copy; on Messrs. Coffin & Mitchell, sol'rs for the Ohio & Miss. R. R. Co., by handing a copy to a gentleman in charge of their law office in Cincinnati, representing himself to be Mr. Mitchell, of said firm, and leaving it with him; and on Charles Fox, solicitor for John Bates, by handing a copy to and leaving it with a person in charge of his law office in Cincinnati; that on the 16th day of October, 1861, he served the annexed petition, affidavit, and *and* notice on King and Thompson, solicitors for R. W. Keys, and John W. Herron, solicitor for Henry Hanna, by leaving with a person in charge of their respective offices a true copy thereof; and that on the same day he served the annexed petition, affidavit, and notice on George Hoadly, trustee, by handing to and leaving with him a true copy thereof; and on the same day he served Peter Zinn, the defendant, with the annexed petition, aff't, and notice, by depositing a true copy thereof in the post office at Cincinnati, addressed to him at Cincinnati, and paying the postage thereon; that Cincinnati is the place of residence of said Zinn, as deponent is in-
248 formed and believes; but deponent could not find his house or office, though he diligently searched therefor; and that a notice of adjournment of the hearing to the 19th inst., at 10 o'clock a. m., was added to each notice served on the 16th of October.

CHAS. E. WHITEHEAD.

Sworn to before me this 19th day of Oct., 1861.

FRANKLIN HALLIDAY,
United States Com., S. D., Ohio.

UNITED STATES OF AMERICA,
State of Ohio, ss:

James O'Keefe, being sworn, says that on the 16th of Oct., 1861, he served the within petition, notice, and affidavit on Mess. Ware & Disney, solicitors for the city of Cincinnati, by handing to and leaving with a person in charge of their office, and whom deponent believes was Mr. Ware, true copies thereof, with a no. of adjournment to the 19th inst. thereon endorsed.

JAMES O'KEEFE.

Sworn to before me this 18th day of Oct., 1861.

FRANKLIN HOLLIDAY,
United States Com., S. D., Ohio.

Afterwards, to wit, on the 21st day of October, A. D. 1861, it being of the October term of the court for the year last aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the word and figures following, to wit:

249 *Decree setting aside former decree.*

E. D. MORGAN & CO. *et al.*
vs
THE OHIO AND MISSISSIPPI R. R. COMPANY and others. } Chancery.

On reading the petition of George Peabody, J. S. Morgan and C. C. Gooch, the affidavit of Wm. Curtis Noyes, and notice of motion and proof of service thereof on the attorneys and solicitors for all parties who have appeared in this action, and after hearing Charles E. Whitehead, Flamen Ball, and William Curtis Noyes, esq'rs, on behalf of said motion, and Thomas G. Mitchell, esq., on behalf of the defendant, the Ohio and Mississippi R. R. Co., and N. C. McLean, esq., on behalf of the complainants, having been heard in opposition

thereto, it is ordered and decreed that the decree heretofore granted in this action, taking the bill as confessed by Marshal O. Roberts, John J. Phelps, and Henry A. Coit, trustees of the first mortgage, so far as affects the rights of the before-mentioned petitioners or parties deriving interest through or in connexion with them, be vacated and set aside. That the said petitioners, and any other persons interested through or in connexion with them, and who may elect within the time hereinafter mentioned, be made parties defendants in this action, and that they have leave to file their joint or several answers or bills in the nature of cross bills, asking affirmative relief, providing they shall so elect, and setting up any or all defences or affirmative relief to which they may
250 be entitled; that said defendants have sixty days from this date within which to file such answers and bills in the nature of cross bills.

Entry striking from the files the answers of Cincinnati.

Afterwards, to wit, on the twenty-second day of October, A. D. 1861, it being of the October term of the court aforesaid for the year last aforesaid, this cause came on further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN & Co.
vs.
THE OHIO AND MISSISSIPPI R. R. Co. *et al.* } Chancery.

On motion to the court in this cause, and it being made to appear that the order heretofore made herein, at the June adjourned or special term, 1861, of the court setting aside the default as to the city of Cincinnati, and granting leave to the said city to file its answer, was improvidently made, it is therefore ordered that the said former order be vacated and held for naught, and the said answer stricken from the files.

Receiver's eighteenth monthly report.

Afterwards, to wit, on the 24th day of October, A. D. 1861, there was filed in court here the receiver's eighteenth monthly report in the premises, which report is in the words and figures following, to wit:

Eighteenth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for September, 1861.

Balance from August account		$28,917 02
251 Receipts:		
From passengers prior to 1st September	$4,570 54	
" freight and express...do	23,800 03	
		28,370 57
" passengers on September ac	26,802 04	
" freight .....do	16,076 99	
		42,879 03
" other sources		2,181 93
		102,384 55
Disbursements:		
Paid charges advanced to other roads	2,120 24	
" on account of first mortgage coupons	1,330 00	
" discount and interest	279 60	
" sundry office expenses	125 78	

Paid on acc't of Miami bridge repairs	$5,957 58	
" on acc't of former arrearages	19,578 42	
" on acc't of July current expenses	28,945 78	
" on account of August....do	31,875 48	
" on account of September..do	5,654 19	
		$95,867 07
Balance carried to October ac		6,481 48

JOS. W. ALSOP, *Receiver.*

Receiver's nineteenth monthly report.

Afterwards, to wit, on the 9th day of December, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the receiver's nineteenth monthly report in the premises, which report is in the words and figures following, to wit:

Nineteenth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for October, 1861.

252	Balance from September account		$6,481 48
	Receipts:		
From passengers prior to October 1st		$2,725 66	
" freight and expenses.....do		12,462 28	
" mail service .....do		828 57	
			16,016 51
" passengers on October account		16,993 71	
" freight .....do.....do		19,977 73	
			36,971 44
" other sources			762 83
			60,232 26
	Disbursements:		
Paid charges advanced to other roads		2,481 23	
" on account of repairs to Miami bridge		6,000 00	
" discount and interest		457 32	
" sundry office expenses		128 10	
" note to Wood, Merrill & Co., balance on iron purchase		3,245 55	
" on account of former arrearages		5,300 03	
" " of September, current expenses		34,365 03	
" " of October, current expenses		183 10	
			52,160 36
			8,071 90

JOS. W. ALSOP, *Receiver.*

Answer of Geo. Peabody & Co.

Afterwards, to wit, on the 16th day of December, A. D. 1861, there was filed in the office of the clerk of the court aforesaid the answer of George Peabody & Co., which answer is in the words and figures following, to wit:

Circuit court of the United States for southern district of Ohio.

253 EDWIN D. MORGAN, GEORGE D. MORGAN, JOHN T. TERRY, and SOLON HUMPHREVS, partners under the name of E. D. Morgan & Co., and others,
against
THE OHIO AND MISSISSIPPI RAILROAD COMPANY, EDWARD D. MANSFIELD and GEORGE HOADLY, trustees; Marshal O. Roberts, John J. Phelps, and Henry A. Coit, trustees; Edward Bartlett, David Hoadly, and G. S. Robbins, trustees; the city of Cincinnati, Gethro Mitchell, Richard W. Keys, Samuel Wann, and Hugh McBirney, partners, under the name of Wann & McBirney; Henry Hanna, Peter Zinn, D. F. Goodhue, S. G. Gibhart & Co. and others. } Chancery.

To the honorable the circuit court of the United States for the southern district of Ohio, in chancery:

The answer of George Peabody, of the city of London, in England, Junius Spencer Morgan, of the same city, and Charles Cubitt Gooch, of the same city composing the firm of George Peabody & Co., of the said city, bankers, to the bill of complaint of the above-named complainants:

These defendants say that the above-named defendants, the Ohio and Mississippi Railroad Company, is a corporation duly organized; that in the month of June, 1855, it had issued, and there were then outstanding against it,
254 what are usually called its first mortgage bonds for the eastern division of said road, to the amount of two millions and fifty thousand dollars, each bearing date with the said mortgage, May 24th, 1852, to each of which bonds coupons, in the usual form, for the semi-annual interest were attached, the said interest being payable in the city of New York on the first day of January and the first day of July, respectively; that some of the said bonds were held in the United States, but by far the largest amount of them was held in Great Britain; that in consequence of pecuniary embarrassments the said railroad company were enabled to provide for the payment of the coupons, for the interest to become due on the first day of July in the said year 1855; and inasmuch as these defendants had aided in the negotiation of the said bonds in Great Britain, the said railroad company applied to these defendants for assistance in regard to paying or arranging the said coupons, and that Samuel L. M. Barlow, esq., on behalf of the said company, and as its agent, wrote and sent to them for that purpose a letter, of which the following is a copy:

"NEW YORK, *June* 13, 1855.

"GEORGE PEABODY, Esq.:

"DEAR SIR: Shortly after the return of Mr. Tinker, I wrote, at the
255 request of Mr. Bacon, to Mr. Lampson with reference to the interest on the first bonds of the O. & M. railroad, falling due in July and January next.

"I explained to Mr. Lampson very fully the position of the road, and the reason that induced it to ask this further favor from the English bondholders, and I cannot now add anything to what I then said.

"The proposition was, briefly, that the bondholders should withhold their coupons for one year, provided the company, in the mean time, continued work upon the road, so as to warrant the bondholders in assuming that it would be finished without further delay. The security offered was that afforded by the coupons themselves, in every respect better than any new security within the power of the company. I also suggested that if the work should at any time

be stopped, then that the bondholders should be at liberty at once to proceed under the mortgage.

"By the last mail Mr. Lampson advised me that there was no hope of obtaining any further aid from the bondholders, and I am only induced to write to you on a subject that I know must be distasteful, by reason of a letter received this week from Mr. Hall, the president of the company, in which he repeats that the ability of the company to proceed with work upon the road de-
256 pends almost entirely upon the success of this negotiation.

"Under Mr. Bacon's personal supervision the western division is rapidly approaching completion, and I have no reason to doubt that it will be in successful operation to Vincennes within three weeks from this time.

"The eastern division has obtained the loan of half a million of dollars from Cincinnati, $100,000 of which have already been paid to the company, the balance to be paid in monthly instalments of $100,000, and this amount is likely to be sufficient to enable the company to keep their present force of about one thousand men at work upon the road; but before receiving an instalment from the city, the company is obliged to show that the whole amount of the previous one has been actually expended upon the road; this leaves the company without one dollar for interest, and they have no present resources of any nature whatever. Since the city granted this aid, the credit of the company has gradually revived, so that they have no great difficulty in carrying their floating debt, and Mr. Hall and myself are now negotiating with some of the roads connecting with this for a loan of a million of dollars, which will enable us to finish the road within eight months.

"Mr. Hall thinks there is little doubt of our ability to obtain this aid,
257 and a committee of the Miami road are now engaged in considering the proposition. The county bonds, to which I referred in my letter to Mr. Lampson, are still unsold, though we hope to negotiate them in Germany. Under these circumstances it will be almost impossible for the company to pay the interest about falling due. The western division will be entirely without means for a number of months to come, and to attempt to meet the interest on the bonds of the eastern division will oblige the company to stop work, will deprive it of further aid from the city, and will at once destroy the credit of the road so that it cannot keep its large floating-debt creditors quiet. In a word, it must result in the most disastrous embarrassment, if not in complete ruin.

"In this emergency the company again appeals to your generosity to save them from utter prostration. All that is asked is time upon these coupons, and I am convinced that the bondholders will obtain their interest much earlier and easier by acceding to this request, than by adopting the most stringent measures for immediate foreclosure. The mere neglect of the bondholders to pursue their legal remedies is not sufficient. The credit of the company would, in this case, be ruined as effectually as if a foreclosure were commenced. It must be
258 understood that the company have provided for a definite time for their interest.

"If the bondholders are so numerous that they cannot readily be consulted, it may be possible to effect a loan for the period stated, with the coupons as collateral, I am certain that they will be considered a perfect security by any one acquainted with the present position of the road. In case of a loan the company would give notes at seven per cent. per annum with a proper commission; or if the coupons are simply withheld, they would, of course, bear interest from the times they become payable. I have conversed very freely on the subject of this interest with our mutual friend, Mr. Sherman, and I think he will also confirm my statement, that they cannot in any other manner obtain payment so speedily, nor without endangering their securities to such an extent as to render an ultimate foreclosure absolutely necessary.

"I am sorry to trouble you on so stale and unprofitable a matter with so long a letter, but I trust you will excuse me.

"I remember with great pleasure your kindness while I was in London, and hope to have an early opportunity of reciprocating it in New York. In
259 common with your many friends in this city, I trust you may find time to pay the oft-promised visit to your native country.

"Yours, very truly,

"SAMUEL L. M. BARLOW."

As in and by the said letter will fully appear, and which these defendants are ready to produce. That the negotiation opened with these defendants resulted in a reference of the whole matter, with full instructions, to their correspondents in the city of New York, Messrs. Duncan, Sherman & Co., of the said city, who held various communications with Mr. Barlow, the agent of the said company, and with Messrs. Ellis and West, a committee on behalf of the said company, who were fully authorized and empowered to act in its behalf; and that, on the thirtieth day of June, 1855, the said Barlow, as such agent of the company, wrote and sent to the said Messrs. Duncan, Sherman & Co. another letter upon the same subject, of which the following is a copy:

"Messrs. DUNCAN, SHERMAN & CO.:

"GENT.: I find that Judge Ellis and Mr. West are utterly unable to make any arrangement for the payment of the July interest on the first mortgage bonds. They can only offer the coupons, with the company's notes as collaterals, which no one here has interest enough in the bonds to take, though the security is ample.

"I have easily arranged, on the same basis, to borrow money on the
260 western division, but in that Bacon and all his friends are interested.

"I regret that the protest of the coupons has been found necessary, as the parties are all sanguine that their plans to raise the million of dollars cash could have been carried out successfully in a few days if this interest were provided for; and this default will render foreclosure of the 1st mortgage inevitable. Judge Ellis and Mr. West will probably go home to-morrow.

"Yours, truly,

"SAMUEL L. M. BARLOW.

"JUNE 30th, 1855."

As in and by said last-mentioned letter, now in their possession, and ready to be produced and proven, will fully appear.

These defendants, further answering, say that the negotiation was not broken off by the said communication, but was continued with all the parties so representing and acting on behalf of the said company, and finally resulted in an agreement, in writing, made by the said Duncan, Sherman & Co. on behalf of these defendants, by and with the approbation of the said president of the said company, and Messrs. West and Ellis on its behalf, they and each of them being duly authorized to make and enter into the same for and on behalf of the said company, of which the following is a copy:

"Memorandum of an agreement made in New York this third day of July, A. D. 1855, between George Peabody & Co., of London, bankers, party
261 of the first part, the Ohio and Mississippi Railroad Company, a corporation chartered by the States of Ohio and Indiana, party of the second part, and Abner T. Ellis and Charles W. West, both of the city of Cincinnati, parties of the third part.

"Whereas the parties of the first part heretofore assisted in the negotiation and sale of the first mortgage bonds of the parties of the second part, commonly known as the first mortgage bonds of the eastern division of the Ohio and Mississippi Railroad, in the city of London:

"And whereas the parties of the second part, by reason of their embarrass-

ments, have been unable to provide for the payment of the coupons on said bonds due on the 2d of July current:

"And whereas the party of the first part is willing, by reason of the part they had in negotiating said bonds, to purchase the said coupons in order that the credit of the party of the second part may not be further injured by their going to protest and to hold them for sixty days, to be further extended four months in case certain arrangements for completing the road now in progress are carried out, the parties of the second part paying interest on said coupons at the rate of seven per cent. per annum from maturity till payment, and giving certain further security as hereinafter provided:

262 "And whereas the parties of the second part are engaged in perfecting arrangements for completing their road, and the parties of the third part have agreed to undertake to procure good individual security to the amount of twenty thousand dollars towards purchasing the said coupons of the party of the first part hereafter, with the expectation, on their part, that such arrangements will be completed:

"And whereas the second parties have hypothecated to James Lee & Co. a number of Knox and Davies county bonds to secure certain advances made on them by said James Lee & Co., and have this day made an assignment of all the said county bonds, subject to said advances, to Messrs. Duncan, Sherman & Co., agents for the party of the first part, as part of the additional security to be given under the terms of the agreement herein recited, and the said Duncan, Sherman & Co., as such agents, have this day purchased a large number of such coupons on the behalf of the party of the first part, by virtue of this agreement, before the same could be reduced to writing:

"Now this memorandum witnesseth, that the first party hath undertaken and undertakes to purchase such coupons of said first mortgage bonds to the amount of fifty thousand dollars in all, including those already purchased; and that when the parties of the third part shall furnish the note or notes for

263 twenty thousand dollars hereafter provided for, said note or notes shall be discounted, and the whole proceeds applied to the further purchase of said coupons of said issue, and that they will not present for payment the coupons purchased until the expiration of sixty days; and that in case the said arrangements shall be then perfected, they will not present them for payment until the expiration of four months from that time, and will, in that event, also permit the parties to the said note or notes to renew the same for four months; and that if the said note or notes shall be paid by the makers or endorsers thereof, and the whole purchase-money of all the coupons purchased by the first party shall be reimbursed, with interest as aforesaid, they will deliver said coupons to said third parties, and also all collaterals which they may then hold, to secure the reimbursement of the money expended in such purchase.

"Said second parties undertake to complete arrangements for finishing their road; ratify and confirm the assignment of the said Knox and Davies county bonds to the first party, subject to said advances; agree to pay interest on the said coupons to whosoever may hold them, as if presented and protested, and assent to the transfer both of them and the remaining collaterals for the benefit of the parties to the said note or notes for twenty thousand dollars whenever the first party shall be lawfully reimbursed principal and interest.

264 "Said third parties agree to endeavor to procure, as soon as possible, a note or notes for twenty thousand dollars, signed by themselves and other directors of the said Ohio and Mississippi Railroad Company, and satisfactory to Duncan, Sherman & Co., payable at the office of Duncan, Sherman & Co., in New York, in sixty days, and present the same to them for discount, the proceeds to be applied as above, and to do the same in case of renewal, as above provided for, the renewal note to be equally satisfactory to Duncan, Sherman & Co.

"In witness whereof, the parties have hereunto set their hands and corporate name, respectively: the party of the first part by Duncan, Sherman & Co., their agents duly accredited; the party of the second part by Abner T. Ellis and Charles W. West, members of the finance committee of the board of directors of said corporation, duly authorized; and the parties of the third part each by his own hand.

("Signed) GEORGE PEABODY & CO.,
"By DUNCAN, SHERMANN & CO.
("Signed) THE OHIO AND MISSISSIPPI RAILROAD CO.,
"By ABNER T. ELLIS, } *Of the Finance Committee.*
"C. W. WEST, }
"ABNER T. ELLIS.
"C. W. WEST.

Signed and interchanged in presence of—
"J. C. BANCROFT DAVIS."

As in and by the said agreement, or a copy thereof, ready to be produced and proven, as this court shall direct, will fully appear.

265 That on the sixth day of July, 1855, the said Barlow, as agent of the said company, wrote and sent to Duncan, Sherman & Co., on behalf of and as the agents of these defendants, another letter, of which the following is a copy:

"NEW YORK, *July 6th*, 1855.

"Messrs. DUNCAN, SHERMAN & Co.:

"GENT.: Judge Ellis and Mr. West left for Cincinnati this morning very confident in their ability to secure the necessary sum to complete the eastern division of the O. and M. railroad by subscriptions, under the arrangement about which I have already informed you.

"I believe that they have already obtained $700,000 from parties abundantly able to pay, and they say there is no doubt of their success in getting six other persons or companies to join in the subscription at the rate of $50,000 each. A million of dollars obtained in this way, in addition to the $300,000 to be received from the city of Cincinnati, will finish the road within eight months beyond any question whatever. The company may be obliged to make arrangements for their interest, due in October; but I think that they will have no difficulty in doing so, as these bonds are chiefly held in New York.

266 The actual opening of the western division to Vincennes will alone give an impetus to the work on this road, and will so much strengthen their credit that I do not allow myself to doubt that the whole line will be open in less than a year, and I believe that the stock will be as valuable as that of any road in the Union.

"On the whole, our present position is, in every respect, good, and with a total reorganization of the board in Cincinnati, with a new president and engineer, all our western friends say that we are sure to succeed in finishing the road; and if we do not fail in consummating our present plan, our success will be entirely owing to the generous and timely aid of your firm in coming forward on Tuesday last, and enabling the company to pay its interest.

"If our coupons had gone to protest, we should not have been able to obtain another dollar from the city; our floating debt, which is large, would at once have been called in, and the destruction of our credit would have entirely prevented the success of the plan by which we are now likely to realize a sum sufficient to complete the road.

"I am satisfied that your action in this matter has been of the most essential service, not only to the company, but to the first mortgage bondholders. If this interest had remained unpaid, they would certainly, in some shape or

267 other, have been obliged to expend nearly the whole sum necessary to

build the road. The second bondholders would have contributed something, but the burthen would have been thrown upon the holders of the first mortgage bonds, and they could not have avoided the necessity of this further large advance by a foreclosure; for, though I know that the road is now worth very much more than the amount of the first bonds, yet I am convinced that on a foreclosure, in its present unfinished state, it would not sell for the amount of that mortgage unless the holders of those lands became the purchasers; and if the company can finish it, a cost of $1,300,000, you may safely calculate that the cost to the bondholders would be doubled.

"The committee from Cincinnati were particularly anxious that I should express to your firm their satisfaction and thanks for your generous assistance, and I hope and believe that the company will now be able to complete this great work without being obliged again to appeal to the generosity of our friend, Mr. Peabody.

"Yours, very truly,

"SAMUEL L. M. BARLOW."

As in and by the said letter, now in the possession of these defendants, and ready to be produced and proven, as this court shall direct, will fully appear.

268 These defendants, further answering, say that the said agreement was fully carried out and performed by them in all respects; that all the said coupons so due on the first day of July, 1855, and presented, were purchased and taken up by them under and in pursuance of the said agreement, and the full amount due paid thereon; that the company, and the other parties to the said agreement, however, never gave the additional security, which it was to provide by a note or notes of twenty thousand dollars, as mentioned in the said agreement, according to its terms, or in any other way, but hath hitherto wholly omitted so to do; and that the said Knox and Davies county bonds, mentioned in the said agreement as being pledged to James Lee & Co., have proved wholly worthless to these defendants, as security, by reason of the prior claims for advances thereon by said James Lee & Co. and the worthless character of the said bonds; that the amount so disbursed by these defendants to purchase $68,145 00. and take up the said coupons was the sum of sixty-eight thousand 1 July, '55. one hundred and forty-five dollars, all of which still remains due and unpaid to them, with interest since the said first day of July, 1855, and that these defendants have no security therefor except such as is furnished by the said agreement and the responsibility of the company, which is represented to be, and they believe is, insolvent.

269 These defendants further show, that in the year 1856 some of the holders of the said first mortgage bonds agreed to capitalize all the interest then due and to become due thereon, up to and including July 1st, 1858, and the said company deemed it desirable that all should do so; that the said company again invoked the assistance of one of these defendants, and the said Samuel L. M. Barlow, as the agent of the said railroad company, addressed and sent to them for that purpose a letter containing its propositions for that purpose, of which the following is a copy:

"FENTON'S HOTEL, ST. JAMES STREET,

"*London, April 9th*, 1856.

"GENTLEMEN: At the request of Messrs. William H. Aspinwall, Joseph W. Alsop, Henry Chauncey, Charles Gould, Edwin Bartlett, and their associates, I beg to lay before you, briefly, the present condition of the eastern division of the Ohio and Mississippi Railroad Company, the bonds of which company, to the extent of nearly two millions of dollars, were negotiated through your firm and others, and which are held in England and upon the continent.

"This road, when completed, will form a prominent link in the shortest and

most advantageous route from the eastern States to St. Louis. It com-
270 mences at Cincinnati, Ohio, and terminates at Vincennes, Indiana, a distance of about 195 miles; 90 miles of the road, running west from Cincinnati, is completed; the balance of the line is unfinished, and to a considerable extent not even graded, and owing to the want of any connexion with the western division of the road, that part of the line which is finished is unproductive.

"Prior to January, 1855, the contract for the completion of the whole line was in the hands of Messrs. Page and Bacon, of St. Louis; but about that time their financial embarrassments rendered it necessary that they should surrender their contract to the company. Since that period the company has attempted to proceed with the work with its own resources, derived from its stock subscriptions and otherwise, but owing to the impossibility of negotiating the securities of the company to any extent, it became necessary to stop work upon the line during the last summer, and subsequently the interest upon the first and second mortgage bonds of the company remained unpaid for the same reason.

"In the month of February, 1856, Mr. Aspinwall and his associates were induced to make a critical examination of the affairs of the company with a view to its resuscitation, and having obtained a careful survey of the whole line by Colonel Talcott, of the United States corps of engineers, they en-
271 tered into a conditional contract for the completion and equipment of the line within eighteen months from the first day of May next. This offer contemplated the necessary expenditure of nearly three millions of dollars, for the reimbursement of which the second and third mortgage bonds of the company were to be paid.

"As before stated, this offer was conditioned upon the ability of the associates to make proper arrangements with the general creditors of the company to the extent of over half a million of dollars, as well as with the holders of the present first and second mortgage bonds, in respect to the interest due and to become due upon these bonds, as to the time of the completion of the road.

"The terms of these gentlemen have been acceded to by the parties interested in the United States, and the city of Cincinnati has granted to the company very valuable privileges, which will increase, to a considerable extent, the property covered by the first mortgage; but all these arrangements now depend upon the willingness of the first mortgage bondholders to accede to the proposition which I am authorized to offer them, and which is as follows:

"They offer to the holders of the first mortgage bonds the payment of the coupons due and to become due up to and including the first day of January, 1858, in the new mortgage bonds of the company; four-fifths of the coupons to
272 be paid in the second bonds at 80 per cent., and one-fifth in the third bonds at the same rate; the interest on these new bonds, as well as upon the coupons from the time they fall due to January, 1858, to be adjusted and paid in the new securities, so that the first interest, payable in cash, would be receivable in July, 1858. It is now proposed that interest upon the coupons from the time they become due to and including January, 1858, should be allowed at the rate of 7 per cent. per annum.

"In order that the present position of the bondholders, as holders of the first lien, should not be changed until the actual completion of the road, it is proposed that the coupons, as the become due up to January, 1858, should be held by some parties, to be selected for that purpose in London, not to be exchanged for the new bonds until the associates comply with their contract.

"The new bonds will be in sums of five hundred and one thousand dollars; and in making the final exchange of bonds for the coupons, certificates of the company, bearing the same interest, and convertible into the bonds, will be issued for fractional sums.

"The result of this arrangement will be, that each holder of a bond for $1,000 will convert five instalments of interest into the new bonds, viz:

273	Coupon due January, 1856	$35 00
	Interest on interest to January, 1858	4 90
	Coupon due July, 1856	35 00
	Interest on interest to January, 1858	3 67
	Coupon due January, 1857	35 00
	Interest on interest to January, 1858	2 45
	Coupon due July, 1857	35 00
	Interest on interest to January, 1858	1 22
	Coupon due January, 1858	35 00
	Total amount of interest to be funded	187 24
	Which is to be paid in second bonds, bearing interest from January, 1858	187 24
	In third bonds, like interest	46 80
		234 04

"Bearing a premium of 25 per cent.

"With reference to the value of these new bonds, it will only be necessary to advert to the fact, that upon them alone the associates are willing to advance the large sum necessary for the completion of the road, and that a number of these gentlemen have no present interest in any of the securities of the company.

"The parties for whom I am acting are well known in New York as merchants and bankers of large means and high commercial standing, and their names afford a certain guarantee that they will faithfully carry out their engagements
274 without delay, and thus render the bonds of the company equal to any others in America in point of security.

"Unless this proposition should prove acceptable to the bondholders the company must go into bankruptcy, and the only remedy for the bondholders would be a foreclosure of their mortgage. This would undoubtedly be attended with great delay as well as trouble and expense, and the result, probably, would not be as favorable to the bondholders as this proposition.

"It is necessary that work upon the line should be resumed by the 1st of May, and the iron should be shipped from England at once. I therefore request that your decision be notified to me during the present week, as I propose to sail for New York on the 19th instant.

"With great respect, I am, gentlemen, your obedient servant,

"SAMUEL L. M. BARLOW.

"Messrs. GEORGE PEABODY & Co."

As in and by the said letter will fully appear; that the same was accompanied by another letter from J. C. B. Davis, the counsel for the first mortgage bondholders, of which the following is a copy:

"THE CLARENDEN HOTEL, LONDON,

"*April 13th*, 1856.

275 "GENTLEMEN: Having been employed for some months past by a part of the first mortgage bondholders of the Ohio and Mississippi railroad to watch after their interests, I have, at your request, examined Mr. Barlow's proposition relative to the coupons now due and to become due up to January, 1858. I have no hesitation in saying that, in my judgment, the bondholders will consult their interests by accepting it, rather than attempt a foreclosure of the mortgage, which could only be attended with expense and a delay, pending which the property would greatly depreciate. In the course of my examinations I have, among other things, inquired concerning the condition of the property of the company, both real and personal, and have found that, even now, it is depre-

ciating from the suspension of the work. It is of great importance to all persons interested in this undertaking that the work should be resumed as quickly as possible. Many schemes have been devised for this, but the one which Mr. Barlow represents is the only one that has not fallen through before it could be brought to a head. If this does not go on, I can see no feasible way but for the first mortgage bondholders to make a combination for purchasing the road under a foreclosure, and finishing it themselves; and I have no doubt, from all I have seen, that the loss by delay, in getting a final decree in their
276 favor, (without which it would be unwise to put any more money into the work,) would be much greater than the amount of the interest which they are asked to capitalize.

"The gentlemen whom Mr. Barlow represents are abundantly able to carry through what they undertake. When completed, the capacity of the road to earn interest upon both issues of bonds is not doubted by those best acquainted with that country.

"I have the honor to be, gentlemen, your obedient servant,

"J. C. BANCROFT DAVIS,

"*Counsel for first mortgage bondholders.*

"Messrs. GEORGE PEABODY & Co."

As by the said letter will also appear; that these defendants did not enter into any agreement upon the subject so proposed to them, but their senior partner, the said George Peabody, agreed to aid them in making that arrangement; and on the 17th day of April, 1856, at the city of London, at the request of the said Barlow, as agent of the said company, made and entered into an agreement with the said company upon that subject in the form of a letter, signed by the said George Peabody, and addressed to the said Barlow, of which the following is a true copy:

"LONDON, *April 17th*, 1856.

"SAMUEL L. M. BARLOW, Esq.:

277 "DEAR SIR: Many of the holders of the first mortgage bonds of the Ohio and Miss. Railroad Company have already acceded to the terms proposed in your letter to my firm of the 9th instant, for the capitalization of all interest to and including January 1, 1858; and in order to enable you to complete the other necessary arrangements on behalf of Mr. Aspinwall and his associates, I hereby guarantee and agree that all the holders of the 1,943 bonds sold in Europe shall accept these terms, and fund all their coupons for the period stated; and in case any of the holders of these bonds refuse to assent to this arrangement, I agree to save the company harmless against any proceedings that may be taken thereon.

"It is understood that this agreement shall in no way affect my present rights in regard to the collaterals placed in my hands to secure a loan made by me to the company in July last.

"Yours, very resp'y,

"GEORGE PEABODY."

As in and by a duplicate of the said letter, in the handwriting of the said Barlow, subscribed by the said George Peabody, now in his possession, will more fully appear, and which these defendants offer to produce and prove.

278 These defendants further show, that at the same time the said George Peabody entered into the agreement contained in the said letter, and as an inducement to him to enter into the same, and as a condition of his agreeing thereto, the said Barlow made and entered into an agreement with him of the same date, which agreement is also contained in a letter of the said Barlow to the said Peabody, of which the following is a true copy:

"LONDON, 17*th April*, 1856.

"GEORGE PEABODY, Esq.:

"MY DEAR SIR: In case you are obliged, under your guarantee of this date, to pay the coupons on one hundred thousand dollars of bonds for the period stated in my letter to your firm of the 9th inst., which would amount to the sum of $17,500, I agree to bear one-half of the amount, say $8,750, personally.

"I do not believe that you will find any great difficulty with the bondholders; and if any of them insist upon payment, I will join you in all proper attempts to coerce an acceptance of my proposition of the 9th inst. I will also give my personal attention to resisting any payment of these coupons, in case of suits brought against the company, it being understood that if you are obliged
279 to pay coupons on more than $100,000 of these bonds, that this excess is assumed by you alone.

"Yours, very truly,

"SAMUEL L. M. BARLOW."

As in and by the said letter will fully appear.

These defendants, further answering, say that no other agreement was ever made upon any of the subjects embraced in the said last-mentioned letter by the said George Peabody, except such as is contained therein, and that no agreement whatever upon that subject was made by the said firm of George Peabody & Co. in its firm name.

These defendants further show, that, owing to the embarrassments which they knew the said company was laboring under, they have not hitherto pressed for the payment of the said coupons, or the interest thereon, in the hope that the said company would be able to pay the same and perform the agreement with them in that behalf; and that for the same reason they have not foreclosed the said first mortgage by which the said coupons were secured, nor called upon the trustees named in the said first mortgage to foreclose the same; nor have the said trustees taken any steps or done anything to that end at the instance or request of these defendants; that the amount paid by these defendants for the said coupons as of the said first day of July, 1855, was the sum of $68,145,
280 and that the whole amount thereof is still due and unpaid to them, with interest thereon, and that the same has not in any way been paid or satisfied to them; nor have the defendants, or any of them, or any one of them in their behalf, ever made any agreement in regard thereto to satisfy the same or postpone the payment thereof, or to accept any other security or thing in lieu thereof, or to capitalize or otherwise extinguish the same in any way or manner, or by any agreement whatsoever; but that, on the contrary thereof, the said coupons and the interest they represent are still in full force and effect, and under and by virtue of the said first mortgage and the bonds under which they were made, constitute a first lien and incumbrance upon the property embraced in the said first mortgage, and that they are advised that the amount due to these defendants thereon is payable out of the first moneys that may be raised from a sale of the said mortgaged premises, and before any coupons or interest accruing thereon after the said first day of July, 1855, and before any of the principal or interest due or to become due upon any subsequent mortgage or incumbrance upon the said premises, and they pray the same may be so held and declared by this court.

281 And these defendants, further answering, say that they have no knowledge or information in regard to the other matters stated in the said bill of complaint, except they are informed and believe, and therefore admit the execution and delivery of the first and second mortgages in the said bill mentioned, and that they have been also informed and believe that the said complainants, being the holders and owners of some of the bonds issued under

the said second mortgage, (but the amount thereof they are not informed, and therefore do not admit the same, but leave the same to be proved by the said complainants in such manner as they may be advised,) agreed to and with the said railroad company, and a large number of parties holding other bonds issued under both of the said mortgages, to comply with the said proposition for capitalization for the bonds so held by them, and the interest thereon, and to enter into the same and to become parties thereto, and that they duly made and executed an agreement in writing to that effect, and that thereby other parties holding such bonds were induced to and did enter into and agree to adopt such capitalization plan, and that the said complainants failed to comply therewith themselves, although bound in equity so to do, and these defendants claim and insist that by means of the said agreement to capitalize the said bonds,
282 and the interest thereon, the said complainants are barred from maintaining their said bill of complaint.

And these defendants, further answering, deny all other matters and things in the said bill of complaint not hereinbefore specifically answered or denied.

GEORGE PEABODY. [SEAL.]
J. S. MORGAN. [SEAL.]
C. C. GOOCH. [SEAL.]

NOYES & TRACY, *Solicitors for Defendants.*
WM. CURTIS NOYES, *of Counsel.*

CONSULATE OF THE UNITED STATES OF AMERICA, *London.*

I, Freeman H. Morse, consul of the United States of America for London, in the kingdom of Great Britain, do hereby certify that on the twenty-third day of November, 1861, George Peabody, Charles Cubitt Gooch, and Junius Spencer Morgan, of the city of London, England, the above-named defendants, to me known, appeared before me in person, and being by me duly sworn, did depose and say that they had read the preceding answer and knew the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters they believe it to be true.

283 [SEAL.] In testimony whereof, I have hereunto set my hand and seal of office, in London aforesaid, on the day and year above written.

F. H. MORSE.

Afterwards, to wit, on the 10th day of January, A. D. 1862, there was filed in the office of the clerk of the court aforesaid the receiver's 20th report in the premises, which report is in the words and figures following, to wit:

Receiver's twentieth monthly report.

Twentieth monthly report of Joseph W. Alsop, receiver of the Ohio & Mississippi Railroad Company, for November, 1861.

Balance brought from October acc't		$3,071 90
Receipts:		
From passengers prior to November 1st	$2,393 24	
" freight and express " "	18,317 22	
		20,710 46
From passengers on November account	17,797 30	
" freight do. do.	19,438 48	
		37,235 78
" charges advanced in acc't with other roads		800 38
" discount allowed in settlement with other roads		2,961 44
" other sources		185 12
		69,965 08

Disbursements:

Paid on account of repairs of bridge No. 10	$3,686 97	
" discount and exchange	31 25	
" sundry office expenses	222 15	
" on account of former arrearages	615 08	
" on account of September and October current expenses	$58,291 76	
		62,847 21
284 Balance carried to December acc't		$7,117 87

JOSEPH W. ALSOP, *Receiver.*

Afterwards, to wit, on the 10th day of February, A. D. 1862, there was filed in the office of the clerk of the court aforesaid the receiver's twenty-first report in the premises, which report is in the words and figures following, to wit:

Twenty-first monthly report of receiver.

Twenty-first monthly report of Joseph W. Alsop, receiver of the Ohio & Mississippi Railroad Company, for December, 1861.

Balance brought from November acc't		$7,117 87
Receipts:		
From passengers prior to 1st December	$3,616 87	
" freight do. do.	11,667 20	
" Adams Express do. do.	3,822 01	
" mail service to October 1st	9,228 42	
		28,334 50
" passengers on December acc't	19,494 15	
" freight do. do.	28,058 17	
		47,552 32
" other sources		381 94
		$83,386 63

Disbursements:

Paid charges advanced in acc't with other roads	1,220 25	
" discount, interest and exchange	2,823 53	
" on account of extraordinary repairs of bridges,	4,474 64	
Paid on account of receiver's temporary loan.	5,000 00	
285 " on account of first mortgage coupons, due July 1st, 1860	455 00	
Paid sundry office expenses	115 26	
" on account of former arrearages	17,879 41	
" on account of current expenses prior to Dec'r 1st	35,804 71	
" on account of December current expenses	3,374 41	
		71,147 21
Balance carried to January a'c, 1862		12,239 42

JOS. W. ALSOP, *Receiver.*

Further instructions to the receiver.

Afterwards, to wit, on the 26th day of February, A. D. 1862, it being of adjourned and special term of February, of the court aforesaid, for the year last aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

EDWIN D. MORGAN
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY *et. al.* } Chancery.

On motion to the court, in this cause, it is ordered that Joseph W. Alsop, esq., the receiver heretofore appointed herein, out of any moneys in his hands as such receiver, pay the expenses incurred by the trustees named in the decree for sale, heretofore rendered, in advertising the property therein described for sale, and also the costs hitherto accrued, due to any of the officers of this
286 court, or of the circuit court of the United States for the district of Indiana, or to the commissioner appointed to report upon the condition of the property, and upon the liabilities of the said railroad company.

Receiver's twenty-second monthly report.

Afterwards, to wit, on the 8th day of March, A. D. 1862, there was filed in the office of the clerk of the court aforesaid the receiver's twenty-second report in the premises, which report is in the words and figures following, to wit:

Twenty-second monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for January, 1862.

Balance brought from December a'c		$12,239 42
Receipts:		
From Adams Express Company, for December	$3,780 36	
" mail pay for the quarter ending December 31st,	10,853 25	
" passengers prior to 1st inst	3,248 68	
" freight do. do.	11,325 29	
		29,207 58
" passengers on January a'c	14,198 45	
" freight do. do.	27,541 16	
		41,739 61
" temporary loan on note discounted		6,000 00
" other sources		309 37
		89,495 98
Disbursements:		
Paid charges advanced to other roads	342 30	
Paid on account of temporary loan	5,000 00	
287 " on account of extraordinary bridge repairs	3,274 76	
" on account of former arrearages	3,200 00	
Paid on account of December current a'c	48,909 08	
" discount and interest	181 13	
" sundry office expenses	199 20	
" on account of January current a'c	3,430 95	
		64,528 42
Balance carried to February a'c		$24,967 56

JOS. W. ALSOP, *Receiver.*

Entry appointing a commission to take deposition of Peabody & Co.

Afterwards, to wit, on the eleventh day of March, A. D. 1862, it being of the February special and adjourned term of the court aforesaid, for the year last aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. MORGAN and others
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY *et al.* } Chancery.

On reading and filing the consent, signed by N. C. McLean, solicitor for the defendant, the Ohio and Mississippi Railroad Company and others, which consents are hereto annexed, and on motion of Noyes & Tracy, solicitors for the defendants, George Peabody, Junius Spencer Morgan, and Charles Cubitt Gooch, it is ordered that the testimony of George Peabody, Junius Spencer Morgan, and Charles Cubitt Gooch, all residing in London, in the kingdom of Great Britain, in Europe, be taken under a commission, to be used on the trial
288 of this cause, and for that end a commission do issue from this court, directed to Freeman H. Morse, consul of the United States of America, at London, who is hereby appointed commissioner for that purpose; that said commission be accompanied with written interrogatories to be propounded by the solicitors for George Peabody & Co., and further interrogatories or cross-interrogatories, or both, to be propounded by the solicitor for the defendant, the Ohio and Mississippi Railroad Company, providing they serve any such interrogatories or cross-interrogatories upon the solicitors of George Peabody & Co. within twenty days after the service upon them by mail of a copy of said commission and interrogatories. That the testimony of each witness so taken be separately reduced to writing, subscribed by the witness, and sworn to before the commissioner named in the commission, who shall thereupon sign his name and affix his seal thereto, and deliver it to the solicitor of the defendants, George Peabody and Company.

Receiver's twenty-third monthly report.

Twenty-third monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for February, 1862.

Afterwards, to wit, on the 8th day of April, A. D. 1862, there was filed in the office of the clerk of the court aforesaid the receiver's twenty-third report in the premises, which report is in the words and figures following, to wit:

289 Balance from January ac			$24,967 56
Receipts:			
From Adams Express Co. for Jan'y	$2,882 05		
" passengers prior to 1st Febr'y	4,314 68		
" freight " " "	11,074 10		
			18,270 83
" passengers on February ac	15,396 26		
" freight " " "	32,175 14		
			47,571 40
" other sources, rents, &c			2,322 54
			93,132 33
Disbursements:			
Charges advanced in account with other roads	4,131 40		
Paid on account of temporary loan	5,000 00		

Paid on ac. of extraordinary bridge repairs	$1,000 00	
" discount and interest	221 21	
" on account of new cars built	1,383 82	
" on account of former arrearages	15,841 25	
" on account of Dec'r current expenses	679 56	
" on account of January do.	42,497 18	
" on account of February do.	4,687 79	
		$75,442 21
Balance carried to March ac		17,690 12

JOS. W. ALSOP, *Receiver.*

Afterwards, to wit, on the sixth day of May, A. D. 1862, there was filed in the office of the clerk of the court aforesaid the receiver's 24th monthly report in the premises, which report is in the words and figures following, to wit:

Twenty-fourth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Company, for March, 1862.

290

Balance from February account		$17,690 12
Receipts:		
From Adams Express Co. for February	$1,769 74	
" passengers prior to 1st March	9,172 66	
" freight " " "	8,397 48	
		19,339 88
" passengers on March account	21,857 53	
" freight " "	28,066 76	
		49,924 29
" other sources for the month		533 76
		87,488 05
Disbursements:		
Charges advanced in account with other roads	3,474 06	
Paid on acc't of extraordinary bridge repairs	3,393 75	
" " of new cars built	1,391 84	
" discount and interest	490 77	
" sundry office expenses	533 33	
" on acc't of former arrearages	12,881 50	
" on acc't of February current expenses	43,240 85	
" on acc't of March " "	9,925 45	
		75,331 55
Balance carried to Ap'l ac		12,156 50

JOS. W. ALSOP, *Receiver.*

Afterwards, to wit, on the sixth day of June, A. D. 1862, it being of the April term of the court aforesaid, for the year last aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

291 *Entry instructing receiver to enter into contract with Ill. southern R. R. Co.*

E. D. MORGAN & Co.
vs.
THE OHIO & MISSISSIPPI R. R. CO. *et al.* } In chancery.

On motion to the court in this cause, and it being made known that a very large majority of the parties interested in the Ohio and Mississippi Railroad

Company are desirous that that company shall enter into a contract with the Illinois Southern Railroad Company and others, by which the completion of the road of the latter company may be aided, it is ordered that Joseph W. Alsop, esq., receiver, execute such a contract, in the name of the Ohio and Mississippi Railroad Company, agreeing to set apart forty per cent. of the gross earnings it shall receive from the transportation of freight and passengers, which shall be delivered to it by, or which shall be delivered by it to the Illinois Southern Railroad Company for the redemption purchase of bonds of the latter company to the amount of $500,000 00, and to endorse upon each of said bonds that it is agreed to be received at par in payment of forty per cent. of such gross earnings, and to do such other things as are set forth in the draft of a contract now submitted to the court for examination. It is understood, however, that the rights of any party who has not assented to
292 this contract shall not be concluded hereby.

Afterwards, to wit, on the 14th day of June, A. D. 1862, there was filed in the office of the clerk of the court aforesaid the depositions of George Peabody, Junius Spencer Morgan and Charles Cubitt Gooch, which depositions are in the words andfigures following, to wit:

At a term of the circuit court of the United States for the southern district of Ohio, held at Cincinnati, March 11th, 1862—present, the Hon. Humphrey H. Leavitt, judge of said court; Edward D. Morgan and others, against the Ohio and Mississippi Railroad Company and others—

On reading and filing the consent, signed by N. C. McLean, solicitor for the complainants, Thomas G. Mitchell, solicitor for the defendant, the Ohio and Mississippi Railroad Company and others, which consents are hereto annexed, and on motion of Noyes and Tracey, solicitors for the defendants, George Peabody, Junius Spencer Morgan and Charles Cubitt Gooch—

It is ordered that the testimony of George Peabody, Junius Spencer Morgan and Charles Cubitt Gooch, all residing in the kingdom of Great Britain, in Europe, be taken under a commission to be used on the trial of this cause; and for that end, that a commission do issue from this court, directed to Freeman H. Morse, consul of the United States of America at London, who is
293 hereby appointed a commissioner for that purpose.

That said commission be accompanied with written interrogatories to be propounded by the solicitors for George Peabody and Company, and further interrogatories or cross-interrogatories, or both, to be propounded by the solicitor for the defendant, the Ohio and Mississippi Railroad Company, providing they serve any such interrogatories or cross-interrogatories upon the solicitors for George Peabody & Co. within twenty days after the service upon them by mail of a copy of said commission and interrogatories.

That the testimony of each witness so taken be separately reduced to writing, subscribed by the witness, and sworn to before the commissioner named in the commission, who shall thereupon sign his name and affix his seal thereto and deliver it to the solicitor of the defendants, George Peabody and company.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, ss:*

I, John McLean, clerk of the circuit court of the United States for the seventh judicial circuit and the southern district of Ohio, hereby certify the foregoing to be a true and accurate copy of the original as the same is entered upon the journal of said court and on file in this office.

294 In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this eleventh day of March, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States of America the eighty-sixth.

[SEAL.]

Attest: JOHN McLEAN, *Clerk.*

The people of the United States of America to Freeman H. Morse, consul of the United States of America at London.

Know ye that we, with full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you to examine George Peabody, Junius Spencer Morgan, Charles Cubitt Gooch, as witnesses in a cause pending in the circuit court of the United States of America for the southern district of Ohio, in which Edwin D. Morgan, George D. Morgan, John T. Terry, and Solon Humphreys, partners under the name of E. D. Morgan & Co., and others, are plaintiffs, and the Ohio and Mississippi Railroad Company, Edward D. Mansfield and George Hoadly, trustees, George Peabody, Junius Spencer Morgan, Charles Cubitt Gooch, and others, are
295 defendants, on the part of the defendants George Peabody, Junius Spencer Morgan, and Charles Cubitt Gooch, on oath upon the interrogatories annexed to this commission to take and certify the deposition of the witnesses hereinbefore named, and return the same according to the directions hereunto annexed.

Witness Hon. Humphrey H. Leavitt, at a circuit court of the United States held at the city of Cincinnati, the eleventh day of March, one thousand eight hundred and sixty-two, and of American independence the eighty-sixth.

Attest: JOHN McLEAN, *Clerk*.

NOYES and TRACEY, attorneys for George Peabody, Junius Spencer Morgan, and Charles Cubitt Gooch.

Directions for executing the commission.

The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows:

1. They, or any one of them, shall publicly administer an oath to the witnesses named in the commission, that the answer given by such witnesses in the interrogatories proposed to them shall be the truth, the whole truth,
296 and nothing but the truth.

2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same.

3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioner.

4. The commissioners shall subscribe their names to each sheet of the deposition taken by them; they shall annex all the depositions and exhibits to the commission, upon which their return shall be endorsed; and they shall close them up under their seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence.

5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet, so directed, in the nearest post office.

6. If there be a direction on the commission to return the same by an
297 agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

The above is an extract from the revised statutes of the State of New York, vol. 2, page 394, relating to the taking of testimony out of the State.

This commission, when executed, is to be returned by mail to Noyes & Tracy, solicitors, 50 Wall street, New York city, United States of America.

The execution of this commission appears in certain schedules hereunto annexed.

FREEMAN H. MORSE, *Commissioner.*

LONDON, *May 3d*, 1862.

Annexed to the commission is an extract from the statutes of the State of New York relative to the taking of testimony out of the State, which extract is directed by law to be annexed to the commission; but as it does not comprise everything necessary to be attended by the commissioners, they are requested to observe the following more ample

Instructions.

I. All the commissioners named in the commission should have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified, or could not be notified, and the reasons for their not acting, be stated.

298 II. The commission must be executed by the commissioners named therein.

III. The acting commissioner will examine the witnesses separately, after publicly administering to them the following oath or affirmation:

"You do swear that the answers which shall be given by you to the interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth: so help you God."

The oath shall be administered (except in the cases hereinafter mentioned) by the witness laying his hand upon and kissing the Gospels. But if the witness shall desire it, he shall be permitted to swear in the following form: "You do swear in the presence of the ever-living God;" and while so swearing he may or may not hold up his hand, in his discretion. Or, if the witness shall declare that he has conscientious scruples against taking an oath or swearing in any form, he shall be permitted to make his affirmation in the following form: "You do solemnly, sincerely, and truly declare and affirm," omitting the words "so help you God."

IV. The general style or title of the depositions must be drawn up in the following manner:

Depositions of witnesses produced, sworn, (or affirmed,) and examined the day of in the year one thousand eight hundred and sixty-two, at the city of under and by virtue of a commission

299 issued out of the circuit court of the United States for the southern district of Ohio, in a certain cause therein depending and at issue between Edwin D. Morgan and others, plaintiffs, and the Ohio and Mississippi Railroad Company and others, defendants, as follows:

A B, of (insert his place of residence and occupation.) aged years and upwards, being duly and publicly sworn (or affirmed) pursuant to the directions hereto annexed, and examined on the part of the defendants, doth depose and say as follows, viz: first, to the first interrogatory he saith, &c., (insert the witness' answer.) Second, to the second interrogatory he saith, &c., and so on throughout. If he cannot answer, let him say that he knoweth not.

V. If there be any cross-interrogatories, the witness will go on thus: first, to the first cross-interrogatory he saith, &c., and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting commissioner will certify as follows:

Examinations taken, reduced to writing, and by the witness subscribed and sworn to, this day of 1862, before

——— ———, *Commissioner.*

VII. If any papers or exhibits are produced and proved, they must be

annexed to the depositions in which they are referred to, and be sub-
300 scribed by the witness and be endorsed by the acting commissioners in this manner:

At the execution of a commission for the examination of witnesses, between Edwin D. Morgan and others, plaintiffs, and the Ohio and Mississippi Railroad Company and others, defendants, this paper writing was produced and shown to (insert the witness' name,) and by him deposed unto at the time of the examination, before

——— ———, *Commissioner.*

VIII. The acting commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the commissioners will administer to him the following oath and certify thereto:

You do solemnly swear that you will truly and faithfully interpret the oath and interrogatories to be administered to , a witness now to be examined, out of the English language into the language, and that you will truly and faithfully interpret the answers of the said thereto out of the into the English language.

Let the deposition be subscribed by the interpreter as well as by witness, and certified by the acting commissioner, as follows:

Examination taken, reduced to writing, subscribed by the witness and
301 by the sworn interpreter, and sworn to by the witness, this day of 18 , before

——— ———, *Commissioner.*

X. The commissioner will make return on the back of the commission by endorsement, thus:

"The execution of this commission appears in certain schedules hereunto annexed.

"——— ———, *Commissioner.*"

XI. The depositions and exhibits (if any) must be annexed to the commission, and then the commission, the directions, the interrogatories, cross-interrogatories, depositions, and exhibits must be folded into a packet and bound with tape. The acting commissioners are to set their seals at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus:

To , esquire, Clerk of the
at .

XII. When the commission is thus executed, made up, and directed, it must be returned in the manner specified in the direction on the commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by one of the acting commissioners, personally, or else be forwarded by some person coming to the place, and who must be able, on his arrival, to make oath
302 before one of the judges or the clerk of the court "that he received the same from the hands of A B, one of the commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting commissioners, in the nearest post office, he making the following endorsement thereon:

"Noyes & Tracey, solicitors, 50 Wall street, New York. Deposited in the post office at this day of 18 , by me.

"——— ———, *Commissioner.*"

In case of returning the commission by a vessel, it is to be deposited by one of the acting commissioners in the letter-bag of such vessel, he making upon the commission the following endorsement:

"Deposited in the letter-bag of the , now lying at , and bound for the port of New York, this day of , 1862, by me.

"——— ———, *Commissioner.*"

The commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission. If the commission be returned by an agent, let him be instructed to call, on his arrival at this place, upon Noyes & Tracey, solicitors, at 50 Wall street, New York, who will direct him as to its delivery.

303 Southern district of Ohio.

EDWIN D. MORGAN and others
against
THE OHIO AND MISSISSIPPI RAILROAD COMPANY and others.

Interrogatories to be administered to George Peabody, Junius Spencer Morgan, and Charles Cubitt Gooch, all of the city of London, bankers, as witnesses in this suit on the part and behalf of themselves as defendants therein, before the American consul in London, who has been appointed a commissioner to take their examination under and by virtue of the stipulation, a copy whereof is hereto annexed.

First interrogatory. State your place of residence, business, and how long you have been in such business, and where.

Second interrogatory. Do you know the defendants, the Ohio and Mississippi Railroad Company? And if so, for how long a time? And have you had any, and if any, what, business relations or transactions with it, and of what character, whether in the negotiation of securities, bonds, or otherwise? State all the particulars fully.

304 Third interrogatory. If you shall answer that you negotiated any securities or bonds for it, state the amount, what kind of securities or bonds, when and to citizens of what country in particular.

Fourth. Look upon the paper purporting to be a letter from Samuel L. M. Barlow to George Peabody & Co., dated June 13, 1855, hereto annexed and marked "Ex. A," on an examination before Hon. William Mitchell, December 21, 1861, and state in whose handwriting it is, if you know, and how you knew it; by whom, and under what circumstances it was received; what official or other connexion the writer of it had with the said railroad company, and what was done in regard to the proposal contained in it, and all the particulars thereof fully.

Fifth interrogatory. If any advance was made by the house of George Peabody & Co. upon the proposal contained in the said letter, or upon any other agreement, state what it was, when, by whom, and through whom it was made, and where; the amount thereof in detail; upon what security, and under what written agreement, and all the particulars thereof fully, and whether any, and if any, what amount is still due thereon.

Sixth interrogatory. Look upon the printed paper purporting to be a
305 copy of a letter from Samuel L. M. Barlow to George Peabody & Co., dated London, April 9, 1856, to which is annexed a printed paper purporting to be a letter from J. C. B. Davis to the same, dated London, April 13, 1856, hereto annexed, and marked "Ex. C," before Hon. Wm. Mitchell, December 21, 1861, and state whether you have seen it before, and when and where; if you received it, from whom and when, and for what purpose?

Were the persons whose names are so affixed to it in London? And, if so for what purpose and in whose behalf? And had you any communications with them, and for what purpose, and with what result? State all the particulars thereof fully.

Seventh interrogatory. Look at the paper purporting to be a letter from or an agreement signed by George Peabody, addressed to the said Barlow, dated April 17, 1856, and marked "Ex. D," before Hon. William Mitchell, December 21, 1861, and state whether it is an original or press copy; by whom the same or the original was drawn; who signed it, and what it was given and received for, and where the original is, and who has it, or to whom it was delivered by name; whether any, and if any, what letter, undertaking, or agreement was executed simultaneously therewith by the said Barlow, and where the same now is, and annex the same and make it a part of your de-
306 position in answer hereto, if it is in your possession; and if not, annex a copy thereof, if in your power so to do.

Eighth interrogatory. If you shall answer the preceding interrogatory substantially in the affirmative, and that any such paper was executed or signed simultaneously by the said Barlow, then state what collaterals in particular, with full details, were then in your hands to secure a loan made by George Peabody to the company in July, 1855; whether the coupons of July, 1855, were any part of such collaterals; and if so, how many and what coupons in particular? How and when, and upon what agreement were the same obtained, and what amount was due you thereon, and in whose possession or control were they or any of them? Were any such coupons, or the amount advanced thereon, or for which they were purchased, ever paid, or satisfied, or capitalized, or provided or agreed to be, or are they still outstanding and due, and secured by the mortgage under which they were issued, or how otherwise? State all the particulars thereof fully.

Ninth interrogatory. If you shall answer that any of said collaterals were Knox and Davies county bonds, state whether anything has been or can be realized upon them, and if not, why not, with all the particulars fully.

307 Tenth interrogatory. Do you know any other matter or thing which may tend to your benefit or advantage in this suit? If so, state the same as fully as if you were particularly interrogated thereto.

NOYES & TRACEY,
Def'ts Att'ys.
WM. CURTIS NOYES,
Of Counsel.

U. S. circuit court, S. district of Ohio.

E. D. MORGAN *et al.*
vs.
THE OHIO AND MISSISSIPPI RAILROAD COMPANY *et al.*

Cross-interrogatories to be propounded on behalf of the defendants to George Peabody, Junius Spencer Morgan, and Charles Cubitt Gooch, as witnesses in this suit, before the American consul in London, who has been appointed a commissioner to take their examination.

These interrogatories are propounded, expressly reserving all exceptions to the competency of the witnesses, they being parties to the suit, and also all exceptions to the competency of the testimony given in chief.

308 First interrogatory. If you shall answer that you negotiated any of the bonds of the Ohio and Mississippi Railroad Company, state the amount so negotiated by or through you or your firm; how many, if any, were retained by you or your firm for your own account; how long you continued to be the owners of any such bonds, and when and to whom you sold those which

you once held, and at what rate; how many bonds, if any, you held or were interested in on the 17th day of April, 1856. State whether you or your firm purchased any; and if so, how many of the coupons of the Ohio and Mississippi Railroad Company in the summer of 1855; and if so, how many, and at what rates, and the dates of each of such purchases particularly and in detail. State what you did in connexion with such coupons, after the receipt of the letter marked A, and referred to in the 4th direct interrogatory, and whether you sent any, and if so how many, of the coupons of the road to Duncan, Sherman & Co., of New York, and whether you gave them any instructions in reference to the same; annex letter to Duncan, Sherman & Co., or to either of the members of this firm, in relation thereto, written in the month of June, 1855. When was the letter of 13th June received by you?

309 Second interrogatory. If you shall answer that you have before seen the printed paper referred to in the 6th direct interrogatory, and marked Ex. C, state whether or not you saw it in manuscript; whether it was submitted to you before it was printed, and by whom, and whether you made corrections in the original draft, and added parts of it. After the same was printed, did you forward that letter to any persons holders of the bonds of the Ohio and Mississippi Railroad Company; to whom, and with what recommendation did you write on this subject to any of the continental holders of these bonds; if so, annex copies of all such letters to your deposition. Did you advise all the bondholders to assent to the funding of all their coupons as the best mode of securing the payment of interest on the future? Did you so advise all your personal friends to whom you had sold the bonds then held by them, including Messrs. Capel, Norbury, Trotter & Co., and Coutts & Co., or any member of either of those firms?

Third interrogatory. Who drafted the letter referred to in the 7th direct interrogatory, marked Ex. D.; where and when did you first see it? Why was any such letter, guaranty, or agreement alleged to be necessary? Were you informed by any one, and if so by whom, that without this letter or

310 guaranty a contract for the purchase of rails could not be consummated on behalf of the associates, W. H. Aspinwall and others? What part of this letter or agreement was drawn by you?

Fourth interrogatory. If you shall answer that any other letter was executed simultaneously by the said Barlow, state its object; at whose request did he execute it? Did you or not say that its sole object was to prevent the associates in New York from relying wholly upon your guaranty, (Ex. D,) and to prevent them from turning the coupon holders over to you for payment, and that you simply wanted to make it said Barlow's interest to compel the holders of any of the coupons of the 1st-mortgage bonds (except those sold in the United States, and which were intended to be excepted from your guaranty, as contained in Ex. D) to fund them in accordance with the plan and the authority of the associates?

Fifth interrogatory. Did you see the letter of authority held by said Barlow from the associates, and did he or not at each interview explain fully to you that the contract made by the associates for the capitalization of the road was conditional only, and could not be entered into, unless all the coupon holders in Europe assented to fund their warrants due and to become due, to and

311 including 1st January, 1858, as stated in his letter to your firm of April 9th, 1856, Ex. D? Did the said Barlow make any contract with you, or with any other person, for the delivery of iron rails; if so, what interest had you or your firm in such contract? When was such contract made, where, at what hour in the day? Had it been previously talked of, and what reasons were given for not consummating it previously? Was it executed on the afternoon of the day that Wm. Barlow left London to return to the United States?

THOMAS G. MITCHELL,
Att'y for O. and M. R. R. Co. and for others.

U. S. circuit court, southern district of Ohio.

EDWIN D. MORGAN and others
against
THE OHIO AND MISSISSIPPI RALROAD COMPANY and others.

1861, Dec'r 21.—Present, W. C. Noyes, for defendant, George Peabody & Co.

William Mitchell sworn before a notary public as commissioner to take the testimony in the above action.

James Tinker sworn for defendants, Peabody & Co.:

Do you know the firm of George Peabody & Co.? and if so, state where they reside, and the names of the members of the firm and their business.

I do. George Peabody, Julius Spencer Morgan, Charles Cubitt
312 Gooch. They reside and carry on business as merchants and bankers in the city of London.

How long have they been in business?

The present firm since 1854, in October, I think, of that year.

Do you know whether the firm was interested in the Ohio and Mississippi Railroad Company; and if so, how early, and in what way?

Previous to 1854, the firm was George Peabody & Charles Cubitt Gooch, under the name of George Peabody & Co.; in 1852 or 1853, to the best of my memory, they negotiated in London the first-mortgage bonds of the eastern division of the Ohio and Mississippi Railroad Company, to the amount of about nineteen hundred thousand dollars. I believe they became owners of some portion themselves at the same time.

Where did the persons generally reside to whom the bonds were negotiated?

The larger portion of the bonds were, I believe, sold to parties residing in England; some to persons residing in Switzerland, and other parts of the continent of Europe.

What have been your relations with both parties, and what your opportunities of acquaintance with their transactions with, or on behalf of, the Ohio and Mississippi Railroad Company?

313 My partner, Wm. Lampson, has for many years been on terms of the closest intimacy with the members of Mr. Peabody's firm; and in 1855 I made a visit from London to this country, and Mr. Peabody requested me to inquire into matters connected with the Ohio and Mississippi railroad, which I did, and they have frequently in London, since and previous, to that date spoken to me freely on these subjects. My partner resides and carries on business as a merchant in the city of London, under the firm of C. M. Lampson & Co., and has frequent communications with me. I have been in America, resident since 1858.

Do you know Samuel L. M. Barlow, esq.? and if so, state whether he had any connexion with the affairs of that railroad company; and if so, what.

I do know Samuel L. M. Barlow, esq., and he has *has* been connected with the affairs of the Ohio and Mississippi Railroad Company, first as friend and counsel of Mr. Bacon, of the firm of Page & Bacon, previous to 1855, and at a later period as negotiator or agent for the association; he has also been president of the western division of the same railroad.

Do you know his handwriting from having seen him write or otherwise; and if so, how?

I have seen him write, and know his handwriting.

Look upon the paper now shown you, consisting of two sheets, pur-
314 porting to be a letter from him to George Peabody, dated June 13, 1855, and state whether it is in his proper handwriting.

It is in the handwriting of Samuel L. M. Barlow throughout. (The letter is marked Ex. A, on part of Peabody & Co.—W. M.)

Look at the paper now shown you purporting to be a letter from Samuel L. M. Barlow to Messrs. Duncan, Sherman & Co., dated July 6, 1855, and state whether it is in his proper handwriting.

It is. This is marked Ex. B, on part of Peabody & Co.—W. M.)

Do you know J. C. Bancroft Davis, of the city of New York? and if so, state how long you have known him, and whether he held any relations to that railroad company; and if so, what and from what time.

I know J. C. Bancroft Davis, and have known him for some years, probably since 1852 or 1853. My impression is, that he was consulted by George Peabody & Co., as to that company. After he returned to this country he was employed by the first bondholders to look after their interest.

Look at the paper now shown you purporting to be a printed copy of a letter from Samuel L. M. Barlow to George Peabody & Co., dated Fenton's Hotel, St. James street, London, April 9, 1856, annexed to which is also a printed copy of a letter purporting to be from J. C. Bancroft Davis to the same persons,
315 dated at the Clarendon Hotel, 13 April, 1856, and state all the facts within your knowledge in regard to the same.

I saw similar printed documents to this in London in 1856. I saw one in Mr. Lampson's office, our office, and another I saw at Mr. Crawshay's; Crawshay was a bondholder of the railroad company; the object of the paper was to induce the holders of the first-mortgage bonds to fund certain coupons on those bonds, and I know that Mr. Crawshay and others did so fund them as suggested by this printed document. (This is marked Exhibit C, on part Peabody & Co.—W. M.)

State whether Messrs. Barlow and Davis were then in London.

I saw Messrs. Barlow and Davis in London at about the dates of this paper, 9 and 13 April, 1856.

Look at the paper now shown you in the form of a letter signed by George Peabody, addressed to Samuel L. M. Barlow, esq., dated London, April 17, 1856, and state in his whose handwriting the body of it is, and in whose handwriting the signature is.

I know this to be a letter-press copy, the body of the writing being the handwriting of S. L. M. Barlow, and the signatures I have to be—(that is, I recognize to be) the handwriting of George Peabody, whom I have often seen write. (It is Ex. D, on part Peabody & Co.—W. M.)

JAMES TINKER.

316 Taken and sworn before me, this 21 December, 1861, the same being read to the witness before his signature.

WM. MITCHELL, *as Com'r, &c.* [SEAL.]

Adj'd to 23.

1861, Dec'r 23.—Present: W. C. Noyes, esq.

Samuel E. Darling, sworn for George Peabody & Co.:

State your place of residence and business.

Bergen, Hudson county, New Jersey; business, banking business in the city of New York, at No. 6 Pine street. My firm is S. E. Darling & Co.

Do you know the firm of Duncan, Sherman & Co. and if so, state their business, and if you hold any relation, with them and if so, what.

I do know them; they are private bankers. I have no business connexion, with them at present. I was book-keeper for them from August, 1853, to May, 1860.

Do you know anything in relation to their taking up or purchasing coupons of the Ohio & Mississippi Railroad Company's bonds in 1855? and if so, state

all your knowledge on that subject, and the number of coupons and their amount—the sums advanced for them, and for and on whose account.

I do know from July 5, 1855, to November 26, of the same year, Duncan, Sherman & Co. paid for one thousand nine hundred and thirty-two
317 coupons of bonds of said road, all payable in New York, July 1, 1855, styled eastern division bonds, each coupon for thirty-five dollars, making the total amount of coupons $67,620, which with interest and commissions amounted to $71,501 70, according to sundry vouchers handed to me for posting in the ledger to account of George Peabody & Co., of London, for whom and on whose account the coupons were paid by Duncan, Sherman & Co.; Duncan Sherman & Co., valued, or George Peabody & Co., for the last mentioned amount, which bills were duly paid.

State, if you please, what you know in regard to the receipt of the coupons by Duncan, Sherman & Co., when they were respectively paid.

All the coupons mentioned by me, with the exception of about one hundred, I know were received by Duncan, Sherman & Co., during that period; I had them in my hands, then or afterwards. Afterwards, when we rendered our account of what coupons were in Duncan, Sherman & Co.'s hands, about 103 coupons were missing.

What became of those that are missing, according to your best knowledge?

I have no knowledge about it. I can presume they were mislaid in the office.

SAMUEL E. DARLING.

318 Taken and sworn before me, this 23 December, 1861, the same being read to the witness before his signature.

WM. MITCHELL, *as Com'r, &c.* [SEAL.]

J. C. Bancroft Davis, sworn for same parties:

I reside in the city of New York, and am a counsellor-at-law.

State your recollection, if any, in regard to an agreement between the Ohio & Mississippi Railroad Co. and George Peabody & Co., of London, in the summer of 1855, as to the coupons of the eastern division, and all the particulars fully.

The agreement which I have in my hand is a copy of the original agreement, which was drawn by me, and was witnessed by me. It is dated the third day of July, 1855. On the first day of July of that year, I think, (it might have been the second; I think it was the first,) Mr. Sherman, of the firm of Duncan, Sherman & Co., sent for me to come to the office of Duncan, Sherman & Co. I found in the private office of the partners Mr. Sherman and Mr. Ellis, president of the Ohio & Mississippi Railroad Company, eastern division; (and I think Mr. West was there, but my recollection is not distinct on that point.) Mr. Sherman stated to me that the July coupons then maturing, of the first mortgage of that company, had not been provided for by the company, and
319 that Duncan, Sherman & Co., on behalf of Messrs. George Peabody & Co., of London, proposed, at the request of the company, to provide for these coupons for the honor of the company, so as to prevent them from going to protest, and they stated to me (sometimes one party speaking and sometimes the other) the nature of the proposed arrangement and the details of it, so far as they had then been agreed upon, in order that I might put them in legal form. We were occupied that day and part of the next in discussing the details, and the result was embodied in that agreement.

What was done with the agreement after it was executed?

I left it with Duncan, Sherman & Co., and have not since seen it.

Do you know whether the notes mentioned in that agreement were given; and if not, why not? State all the circumstances within your knowledge.

They were never given. In the September following the date of this agreement, I went to Cincinnati, under instructions from Duncan, Sherman & Co., to endeavor to get them, but the plan for completing the road referred to in the agreement having fallen through, the parties declined to give them. (The paper produced to this witness is marked Ex. E, on the part Peabody & Co.)

320 Look at the printed paper now shown you, marked "Ex. C, on the part of Peabody & Co.," and state all your knowledge in relation to the letters of which it purports to be copies, and what (if anything) was done or agreed upon in relation to the propositions contained in them.

Those letters were the results of some weeks' negotiation in London between Mr. Barlow, representing the gentlemen named in his letter, and the European bondholders, generally represented in the negotiations by Capil, Norbury, Trotter & Co., and by Messrs. George Peabody & Co. Those two firms together represented the bulk of the European bondholders. Mr. Barlow's letter was referred to me; I wrote the letter which is subscribed by my name; Mr. Barlow wrote the letter which bears his name; the original was referred to me, and I saw Mr. Barlow write it; the two letters were printed together to be circulated among the bondholders.

Was there any other proposition in regard to the plan mentioned in Mr. Barlow's letter, than that which the letter embodies, finally agreed upon?

I am not aware of any; I returned to America by the steamer of the following week, supposing this plan to have been finally arranged.

What was done with the original letters of Barlow and yourself, if you know?

I presume they were left with Peabody & Co.

J. C. BANCROFT DAVIS.

Taken and sworn to before me, this 23d Dec., 1861, the same being read to the witness before his signature.

WM. MITCHELL, *as Com'r.* [SEAL.]

321 George A. Leete, sworn for the same parties:

State your residence and business.

My residence is the city of Brooklyn; I am employed by Duncan, Sherman & Co.

Look at the paper now shown you, marked "Ex. C, on the part of Peabody & Co.," and state whether you know in whose handwriting it is.

It is the handwriting of Mr. Alonzo O. Woodruff, who was a clerk for them from, I think, 1854 to 1857; I know the handwriting, for having seen him write; I commenced with Duncan, Sherman & Co. in July, 1853, and have been with them ever since.

Look at the paper now shown you, purporting to be a copy of a letter from Samuel L. M. Barlow to Messrs. Duncan, Sherman & Co., dated June 30, 1855, and state in whose handwriting it is.

This is also in the handwriting of Mr. Woodruff, signature and all; it is a copy. (This is marked "F, on the part of Peabody & Co.")

Do you know where the originals of either of those papers are?

I do not.

GEO. A. LEETE.

Taken and sworn to before me, this 23d December, 1861, the same being read to the witness before his signature.

WM. MITCHELL, *as Com'r, &c.* [SEAL.]

Adj'd to 24.

322 1861, Dec'r 24.—Present, Wm. C. Noyes, esq.

Louis A. Collin, sworn for the same parties:

State your residence and business.

My residence is in New Jersey, city of Hoboken; I am book-keeper to Duncan, Sherman & Co.

For how long a time have you been so?

Seven years next May.

State all you know in relation to the payment of coupons of the Ohio and Mississippi Railroad Company, eastern division, payable in July, 1855, by that firm, and on whose account, and the amount paid.

In July, 1855, and afterwards, up to December in the same year, Duncan, Sherman & Co. paid the coupons of that company falling due 1st July, 1855, by order and for account of Messrs. George Peabody & Co., of London; the amount was 1,932 coupons of $35 each; for the amount so paid, we drew our drafts for reimbursement on Messrs. George Peabody & Co., of London, together with commission of one-quarter of one per cent., amounting in all to, I think, over $71,000. Those drafts were paid.

Are you able to state the numbers of the coupons paid, or to furnish a list of them, or of any part of them? and if so, please do so.

Yes; I can furnish the numbers of all of them except about 20 or 30; this paper is a list of them. (It is Ex. G, for Peabody & Co.—W. M.) It is
323 a list of those delivered by Duncan, Sherman & Co. to J. P. Morgan, agent for George Peabody & Co., amounting to 1,829 coupons. I have a list also of those which have been paid, but are missing, except of twelve; the numbers of which 12 were not recorded by Duncan, Sherman & Co., viz: 1526 to 1530, 1933 to 1937, 843 to 850, 1865 to 1871, 1511 to 1515, 1913 to 1917, 816 to 818, 1504 to 1505, 176 to 190, 1994, 1995, 1595, 317 to 321, 156 to 160, 2015 to 2019, 1551 to 1560, 196 to 200, 205 to 207, all inclusive. Instead of giving the numbers of all but 20 or 30, I find I can give the numbers of all but twelve.

Do you know what has become of the missing coupons? and if so, please state.

No; I have no idea, whatever, what has become of them; they are, I think, mislaid or lost.

Has any search been made for them; and if so, by whom and where?

Search has repeatedly been made for them by several of the clerks in the office of Duncan, Sherman & Co.

Do you know whether there was any written agreement in relation to paying these coupons; and if so, did you ever see it?

No; at the time of payment I did not know of any such agreement; I heard of it afterwards.

Look at the paper now shown you, marked Ex. E, on the part of Peabody & Co., and state whether you know in whose handwriting it is.

324 It is in the handwriting of A. P. Woodruff, who was in the office of Duncan, Sherman & Co. at the time.

If you have the 1,829 coupons mentioned in Ex. G now present, will you produce them, and have them marked on this examination?

I have them, and will leave them here.

LOUIS A. COLLIN.

Witness adds, I will enclose them in an envelope, and seal the envelope, and indorse my name on the back of it.

LOUIS A. COLLIN.

Taken and sworn before me, this 24 Dec'r, 1861, the same being read to witness before his signature.

WM. MITCHELL, *as Com'r, &c.* [SEAL.]

Solon Humphreys, sworn for the same parties:

State your residence and place of business, and of what firm (if any) you are a member.

My residence is Bergen Point, New Jersey; place of business is New York; I am a member of the firm of E. D. Morgan & Co., which firm consisted, prior to 1 July last, of Edwin D. Morgan, George D. Morgan, John T. Terry, and myself.

Did that firm at any time, and if so when, own any bonds of the Ohio and Mississippi Railroad Company; and if so, what number of bonds, and the amount of each, and were they first or second mortgage bonds?

We owned the bonds for several years prior to 19 September last; they were 77 second-mortgage bonds for one thousand dollars each, with the coupons.

325 How long did you continue to own them; and if they have been disposed of, what has become of them, and who now owns them?

We made a final arrangement in April, 1861, to dispose of them to J. W. Alsop, Wm. H. Aspinwall, Henry Chauncey, and others, which arrangement was consummated and bonds delivered 19 September, 1861; the present ownership of the bonds I know nothing about now; since that time we have no interest in them.

At the time this action was brought, had your firm an interest in those bonds?

We owned them.

SOLON HUMPHREYS.

Taken before me, this 24 Dec'r, 1861, the same being read to witness before his signature.

WM. MITCHELL, *as Com'r.* [SEAL.]

Adj'd to 26th.

Charles H. Dabney, sworn for the same parties:

Please state your residence, place of business, and if a member of any firm, how long you have been so.

New York; Duncan, Sherman & Co.; since the 1st of October, 1854.

If you recollect anything in regard to the payment of coupons of the Ohio and Mississippi Railroad Co., payable July 1, 1855, please state it, and on whose account the payment was made.

We paid Ohio and Mississippi railroad coupons, of that date, on account of George Peabody & Co., of London; it was done under an agreement in

326 writing with certain parties in Cincinnati, by which Mr. Peabody was secured.

Look at the paper marked E, on this examination, and state whether you ever saw the original of it—whether it is in your possession, or in that of your firm; and if not, what has become of it?

I saw the original agreement between these parties, and I am very confident this is a copy of it; the original I think was given to John Cleaveland, a lawyer—that is my impression; I think it was not returned to us; I have instituted a very rigid search through the office; I have not been able to find it; I believe it is not in my possession, nor in possession of my firm. We have examined in the place where such a paper would be likely to be put, and a great many places where it would not be likely to be put, and every place where it possibly could be. Mr. Sherman, one of the members of the firm, is absent in the country, in Africa.

C. H. DABNEY.

Taken and sworn before me, this 26th Dec'r, 1861, the same being read to him before his signature.

WM. MITCHELL, *as Com'r.* [SEAL.]

Louis A. Collin, recalled by the same parties and further examined:

Have you caused any search to be made, or made any yourself, for the original agreement, a copy whereof is marked E, on this examination, and
327 which you have testified was in the handwriting of Mr. Woodruff? and if so, state the particulars of the search and the result.

I looked through my department, and examined every paper which was in the box in which those coupons and other papers relating to the same matter were kept; the result was, I did not find it; I made a diligent search, and I do not believe the agreement is in our office. (The counsel for Messrs. Peabody & Co. now produces and shows to the witness fifteen coupons of the Ohio and Mississippi Railroad Co., payable on 1st July, 1855, for $35 each, being half-yearly interest on bond No. 1720, 1769, 1768, 1767, 1766, 1765, 1764, 1763, 1762, 1761, 1760, 1759, 206, 205, 1771, and asks the witness)—

Look at those coupons—whether they are also original coupons of that company of the same character and description as those paid by Messrs. Duncan, Sherman & Co., as already testified by the witness?

Yes, they are originals of the same description, and the same amount.

LOUIS A. COLLIN.

Taken and sworn before me, this 26th Dec'r, 1861, the same being read to him before his signature.

WM. MITCHELL, *as Com'r.* [SEAL.]

Those coupons are marked each with the initials of the acting commissioner, W. M., and will be enclosed by him in an envelope.—(W. M.)

Adj'd to 27th December.

1861, December 27.—Present, Wm. C. Noyes.

James Lee, sworn for the same parties:

328 State your residence and business.

A merchant, in the city of New York.

Have you had any transactions with the Ohio and Mississippi Railroad Company in regard to any Knox and Davies county bonds? and if so, state when, the amount, and what the transaction was.

I had, as a member of the firm of James Lee & Co., May 6, 1855. He gave the Ohio and Mississippi Railroad Company a credit of fourteen thousand pounds sterling on the Western Bank of Scotland, for which we took their note payable at sixty days, secured by thirty bonds of $1,000 each of the Davies county, and 143 bonds of $1,000 each of Knox county, bonds. The note not being paid, we sold the said bonds on 30th January, 1857, for seventy-five thousand one hundred dollars and fifty-eight cents; which balanced the advance of the fourteen thousand pounds, with the exchange. The sale was on notice to S. L. M. Barlow, and to Charles Gould and others; we had authority, by the note which was given, to sell at public or private sale on failure of the contract to pay, and without notice or with notice.

Was there any surplus over and above the claim for which your firm held the bonds?

No, sir, not any.

State where the sale was made.

In the city of New York, at our office.

329 JAMES LEE.

Taken and sworn before me, this 27th Dec'r, 1861, the same being read to witness before his signature.

WM. MITCHELL, *as Com'r.* [SEAL.]

John Cleaveland, sworn for the same parties:

State your residence and profession.

I am a counsellor-at-law, doing business in the city of New York, and reside at Westport, in the State of Connecticut.

Did you at any time, and if so when, have in your possession a contract between George Peabody & Co. and the Ohio and Mississippi Railroad Company; and if so, when, and for what purpose was it received, and what has become of it?

In February, 1859, Mr. Morgan, a member of the firm of George Peabody & Co., placed in my hands a contract, dated July 3, 1855, made between his firm and the Ohio and Mississippi Railroad Company and others, together with other papers, for my opinion thereon. I cannot state where that contract now is. I have made diligent search for it, and cannot find it among any of my papers. I had confidently believed that I had returned the same to Mr. Morgan, but I cannot state positively that I did so. I have searched, and have caused my clerks to search in my safe, and in all places where it would
330 be probable it was placed or could be found, and such search has been in vain. I gave an opinion in writing, dated February 1, 1859, in which I distinctly refer to the contract as having read and examined it; the opinion was to Mr. Morgan. If the contract was left in my possession, it is, to the best of my knowledge and belief, lost.

JOHN CLEAVELAND.

Taken and sworn before me, this 27th Dec'r, 1861, the same being read to witness before his signature.

WM. MITCHELL, *as Com'r.* [SEAL.]

Adj'd to 30th December.

1861, Dec'r 30.—Present, Wm. C. Noyes, esq.

Alonzo P. Woodruff, sworn for the same parties:

Were you at any time in the employment of Duncan, Sherman & Co.; and if so, when?

I was there for nearly four years, from 1853 to 1857; I was a clerk with them.

Look at the paper now shown you, marked Ex. E, on the part of Peabody & Co., and state in whose handwriting it is, if you know, and whether it was copied from any, and if any, what agreement.

It is in my handwriting, and was copied by me from (I think) an original.

From whom did you receive the original, what did you do with it, and for what purpose was the copy made?

It is so long ago that I am not positive from whom I received it, but I believe it was from Mr. Sherman, of the firm of Duncan, Sherman & Co. I think
331 I gave it to Mr. Sherman, or laid it on his desk. I do not know for what purpose the copy was made; I think to send to London, but I am not sure. I do not where the original is.

Look at the paper now shown you, marked Ex. F, on the part of Peabody & Co., and state in whose handwriting it is, and from what it was copied, if you know.

It is in my handwriting, and copied (I think) from an original, signed by S. L. M. Barlow.

Did you copy it while with Messrs. Duncan, Sherman & Co., and do you remember for what purpose?

I did; and I think it was in nexion with the other, and for the same purpose.

State when those copies were made, as near as you can recollect.

They were made in 1855; and when I made the copies I delivered the originals to Mr. Sherman, or laid them on his desk.

A. P. WOODRUFF.

Taken and sworn before me, this 30 Dec'r, 1861, the same being read to witness before his signature.

WM. MITCHELL, *as Com'r.* [SEAL.]

Ex. A, on part of Peabody & Co., Dec'r 21, 1861.—*W. M.*—Barlow.

"NEW YORK, *June* 13, 1855.

332 "DEAR SIR: Shortly after the return of Mr. Tinker, I wrote, at the request of Mr. Bacon, to Mr. Lampson, with reference to the interest on the first-mortgage bonds of the O. and M. railroad, falling due in July and January next.

"I explained to Mr. Lampson very fully the position of the road, and the reasons that induced it to ask this further favor from the English bondholders, and I cannot now add anything to what I then said.

"The proposition was, briefly, that the bondholders should withhold their coupons for one year, provided the company in the mean time continued work upon the road, so as to warrant the bondholders in assuming that it would be finished without further delay. The security offered was that afforded by the coupons themselves, in every respect better than any new security within the power of the company. I also suggested, that if the work should at any time be stopped, then that the bondholders should be at liberty at once to proceed under the mortgage. By the last mail, Mr. Lampson advised me that there was no hope of obtaining any further aid from the bondholders, and I am only induced to write to you on a subject that I know must be distasteful, by reason of a letter received this week from Mr. Hall, the president of the company, in which he repeats that the ability of the company to proceed with work upon the road depends almost entirely upon the success of this negotiation.

333 "Under Mr. Bacon's personal supervision, the western division is rapidly approaching completion, and I have no reason to doubt that it will be in successful operation to Vincennes within three weeks from this time.

"The eastern division has obtained the loan of half a million of dollars from Cincinnati, $100,000 of which have already been paid to the company. The balance is to be paid in monthly instalments of $100,000, and this amount is likely to be sufficient to enable the company to keep their present force of about one thousand men at work upon the road; but before receiving an instalment from the city, the company is obliged to show that the whole amount of the previous one has been actually expended upon the road. This leaves the company without one dollar for interest, and they have no present resources of any nature whatever.

"Since the city granted this aid, the credit of the company has gradually revived, so that they have no great difficulty in carrying their floating debt, and Mr. Hall and myself are now negotiating with some of the roads connecting with this for a loan of a million of dollars, which will enable us to finish the road within eight months.

"Mr. Hall thinks there is little doubt of our ability to obtain this aid, and a committee of the Miami road are now engaged in considering the pro-

334 position.

"The county bonds to which I referred in my letter to Mr. Lampson are still unsold, though we hope to negotiate them in Germany.

"Under these circumstances, it will be almost impossible for the company to pay the interest about falling due. The western division will be entirely without means for a number of months to come, and to attempt to meet the interest

on the bonds of the eastern division will oblige the company to stop work, will deprive it of further aid from the city, and will at once destroy the credit of the road, so that it cannot keep its large floating-debt creditors quiet. In a word, it must result in the most disastrous embarrassment, if not in complete ruin. In this emergency, the company again appeals to your generosity, to save them from utter prostration. All that is asked is time upon these coupons, and I am convinced that the bondholders will obtain their interest much earlier, and easier, by acceding to this request, than by adopting the most stringent measures for immediate foreclosure.

"The mere neglect of the bondholders to pursue their legal remedies is not sufficient. The credit of the company would, in this case, be ruined as effectually as if a foreclosure were commenced. It must be understood that the
335 company have provided for a definite time for their interest.

"If the bondholders are so numerous that they cannot readily be consulted, it may be possible to effect a loan, for the period stated, with the coupons as collateral. I am certain that they will be considered a perfect security by any one acquainted with the position of the road.

"In case of a loan, the company would give notes at seven per cent. per annum, with a proper commission; or, if the coupons were simply withheld, they would of course bear interest from the times they became payable.

"I have conversed very freely on the subject of this interest, with our mutual friend, Mr. Sherman, and I think he will unhesitatingly advise the bondholders to accept the proposition of the road, and I have no doubt that he will also confirm my statement that they cannot in any other manner obtain payment so speedily, nor without endangering their securities to such an extent as to render an ultimate foreclosure absolutely necessary.

"I am very sorry to trouble you on so stale and unprofitable a matter, with so long a letter, but I trust you will excuse me.

"I remember with great pleasure your kindness while I was in Lon-
336 don, and hope to have an early opportunity of reciprocating it in New York. In common with your many friends in this city, I trust you may soon find time to pay the oft-promised visit to your native country.

"Yours, very truly,

"SAMUEL L. M. BARLOW.

"GEORGE PEABODY, Esq."

Ex. B, on part of Peabody & Co., Dec. 21, 1861.—W. M., No. 4.

"NEW YORK, *July* 6, 1855.

"Messrs. DUNCAN, SHERMAN & Co.:

"GENTS.: Judge Ellis and Mr. West left for Cincinnati this morning, very confident in their ability to secure the necessary sum to complete the eastern division of the O. and M. railroad by subscriptions under the arrangement about which I have already informed you.

"I believe that they have already obtained $700,000 from parties abundantly able to pay, and they say there is no doubt of their success in getting six other persons or companies to join in the subscription, at the rate of $50,000 each.

"A million of dollars obtained in this way, in addition to the $300,000 to be received from the city of Cincinnati, will finish the road within eight months, beyond any question whatever. The Co. may be obliged to make arrangements for their interest due in October, but I think that they will have
337 no difficulty in doing so, as these bonds are chiefly held in New York. The actual opening of the western division to Vincennes will alone give an impetus to the work on this road, and will so much strengthen their credit that I do not allow myself to doubt that the whole line will be open in less than a year, and I believe that the stock will be as valuable as that of any road in the Union.

"On the whole, our present position is in every respect good, and with a total reorganization of the board in Cincinnati, with a new president and engineer, all our western friends say that we are sure to succeed in finishing the road; and if we do not fail in consummating our present plan, our success will be entirely owing to the generous and timely aid of your firm in coming forward on Tuesday last and enabling the Co. to pay its interest.

"If our coupons had gone to protest, we should not have been able to obtain another dollar from the city; our floating debt, which is large, would at once have been called in, and the destruction of our credit would have entirely prevented the success of the plan by which we are now likely to realize a sum sufficient to complete the road.

"I am satisfied that your action in this matter has been of the most essential service, not only to the company, but to the first-mortgage bond-
338 holders. If this interest had remained unpaid, they would certainly, in some shape or other, have been obliged to expend nearly the whole sum necessary to build the road; the second bondholders would have contributed something, but the burden would have been thrown upon the holders of the first-mortgage bonds, and they could not have avoided the necessity of this further large advance by a foreclosure, for though I know that the road is now worth very much more than the amount of the first bonds, yet I am convinced that on a foreclosure in its present unfinished state, it would not sell for the amount of that mortgage unless the holders of those bonds became the purchasers; and if the company can finish it at a cost of $1,300,000, you may safely calculate that the cost to the bondholders would be doubled

"The committee from Cincinnati were particularly anxious that I should express to your firm their satisfaction and thanks for your generous assistance, and I hope and believe that the company will now be able to complete this great work without being obliged again to appeal to the generosity of our friend, Mr. Peabody.

"Yours, very truly,

"SAMUEL L. M. BARLOW."

339 *Ex. C, on part Peabody & Co., Dec'r* 21, 1861.—W. M.

"FENTON'S HOTEL, ST. JAMES STREET,
"*London, April* 9, 1856.

"GENTLEMEN: At the request of Messrs. William H. Aspinwall, Joseph W. Alsop, Henry Chauncey, Charles Gould, Edwin Bartlett, and their associates, I beg to lay before you briefly the present condition of the eastern division of the Ohio and Mississippi Railroad Company, the bonds of which company, to the extent of nearly two millions of dollars, were negotiated through your firm and others, and which are held in England and upon the continent.

"This road, when completed, will form a prominent link in the shortest and most advantageous route from the eastern States to St. Louis. It commences at Cincinnati, Ohio, and terminates at Vincennes, Indiana, a distance of about 195 miles: 90 miles of the road, running west from Cincinnati, is completed. The balance of the line is unfinished, and, to considerable extent, not even graded; and owing to the want of any connexion with the western division of the road, that part of the line which is finished is unproductive.

"Prior to January, 1855, the contract for the completion of the whole line was in the hands of Messrs. Page & Bacon, of St. Louis, but about that time their financial embarrassments rendered it necessary that they should
340 surrender their contract to the company. Since that period the company has attempted to proceed with the work, with its own resources, derived from its stock subscriptions and otherwise; but owing to the impossibility of negotiating the securities of the company to any extent, it became

necessary to stop work upon the line during the last summer, and subsequently the interest upon the first and second mortgage bonds of the company remained unpaid for the same reason. In the month of February, 1856, Mr. Aspinwall and his associates were induced to make a critical examination of the affairs of the company with a view to its resuscitation, and having obtained a careful survey of the whole line by Colonel Talcott, of the United States corps of engineers, they entered into a conditional contract for the completion and equipment of the road within eighteen months from the first day of May next. This offer contemplated the necessary expenditure of nearly three millions of dollars, for the reimbursement of which the second and third mortgage bonds of the company were to be paid.

"As before stated, this offer was conditioned upon the ability of the associates to make proper arrangements with the general creditors of the company to the extent of over half a million of dollars, as well as with the holders
341 of the present first and second mortgage bonds, in respect to the interest due and to become due upon these bonds, to the time of the completion of the road. The terms of these gentlemen have been acceded to by the parties interested in the United States, and the city of Cincinnati has granted to the company very valuable privileges, which will increase to a considerable extent the property covered by the first mortgage; but all these arrangements now depend upon the willingness of the first-mortgage bondholders to accede to the proposition which I am authorized to offer them, and which is as follows:

"They offer to the holders of the first-mortgage bonds the payment of the coupons due and to become due up to and including the first day of January, 1858, in the new mortgage bonds of the company; four-fifths of the coupons to be paid in the second bonds at 80 per cent., and one-fifth in the third bonds at the same rate; the interest on these new bonds, as well as upon the coupons from the time they fall due to January, 1858, to be adjusted and paid in the new securities, so that the first interest, payable in cash, would be receivable in July, 1858. It is proposed that interest upon the coupons, from the time they become due, to and including January, 1858, should be allowed at the rate of 7 per cent. per annum.

342 "In order that the present position of the bondholders, as holders of the first lien, should not be changed until the actual completion of the road, it is proposed that the coupons, as they become due up to January, 1858, should be held by some parties to be selected for that purpose in London, not to be exchanged for the new bonds until the associates comply with their contract.

"The new bonds will be in sums of five hundred and one thousand dollars, and in making the final exchange of bonds for the coupons, certificates of the company, bearing the same interest, and convertible into the bonds, will be issued for fractional sums.

"The result of this arrangement will be, that each holder of a bond for $1,000 will convert five instalments of interest into the new bonds, viz:

Coupon due January, 1856	$35
Interest on interest to January, 1858	4 90
Coupon due July, 1856	35
Interest on interest to January, 1858	3 57
Coupon due January, 1857	35
Interest on interest to January, 1858	2 45
Coupon due July, 1857	35
Interest on interest to January, 1858	1 29
Coupon due January, 1858	35
Total amount of interest to be funded	187 24

Which is to be paid in second bonds bearing interest from January, 1858..... $187 24
343 In third, like interest..... 46 80

Being a premium of 25 per cent..... 234 04

"With reference to the value of these new bonds, it will only be necessary to advert to the fact that upon them alone, the associates are willing to advance the large sum necessary for the completion of the road, and that a number of these gentlemen have no present interest in any of the securities of the company.

"The parties for whom I am acting are well known in New York as merchants and bankers of large means and high commercial standing, and their names afford a certain guarantee that they will faithfully carry out their engagements without delay, and thus render the bonds of the company equal to any others in America in point of security.

"Unless the proposition should prove acceptable to the bondholders, the company must go into bankruptcy, and the only remedy for the bondholders would be a foreclosure of their mortgage. This would undoubtedly be attended with great delay, as well as trouble and expense; and the result, probably, would not be as favorable to the bondholder as this proposition.

"It is necessary that work upon the line should be resumed by the 1st
344 of May, and the iron should be shipped from England at once; I therefore request that your decision be notified to me during the present week, as I propose to sail for New York on the 19th instant.

"With great respect, I am, gentlemen, your obedient servant,

"SAMUEL L. M. BARLOW."

"Messrs. GEORGE PEABODY & Co."

"THE CLARENDON HOTEL, LONDON,
"13*th April*, 1856.

"GENTLEMEN: Having been employed for some months past by a part of the first-mortgage bondholders of the Ohio and Mississippi railroad, to watch after their interests, I have, at your request, examined Mr. Barlow's proposition relative to the coupons now due, and to become due, up to January, 1858. I have no hesitation in saying that, in my judgment, the bondholders will consult their interests by accepting it, rather than attempt a foreclosure of the mortgage, which could only be attended with expense, and a delay, pending which the property would greatly depreciate. In the course of my examinations, I have, among other things, inquired concerning the condition of the property of the company, both real and personal, and have found that, even now, it is
345 depreciating from the suspension of the work. It is of great importance to all persons interested in this undertaking, that the work should be resumed as quickly as possible. Many schemes have been devised for this, but the one which Mr. Barlow represents is the only one that has not fallen through before it could be brought to a head. If this does not go on, I can see no feasible way but for the first-mortgage bondholders to make a combination for purchasing the road, under a foreclosure, and for finishing it themselves; and I have no doubt, from all I have seen, that the loss by delay, in getting a final decree in their favor, (without which it would be unwise to put any more into the work,) would be much greater than the amount of the interest which they are asked to capitalize.

"The gentlemen whom Mr. Barlow represents are abundantly able to carry through what they undertake. When completed, the capacity of the road to

earn interest upon both issues of bonds is not doubted by those best acquainted with that country.

"I have the honor to be, gentlemen, your obedient servant,

"J. C. BANCROFT DAVIS,

"*Counsel for first-mortgage bondholders.*

"Messrs. GEO. PEABODY & Co."

346 *Ex. D, on part Peabody & Co., Dec'r* 21, 1861.—W. M.

LONDON, *April* 17, 1856.

SAMUEL L. M. BARLOW, Esq.:

DEAR SIR: Many of the holders of the first mortgage bonds of the Ohio & Mississippi Railroad Company have already acceded to the *to the* terms proposed in your letter to my firm of the 9th instant, for the capitalization of all interest to and including January 1, 1858; and in order to enable you to complete the other necessary arrangements on behalf of Mr. Aspinwall and his associates, I hereby guarantee and agree that all the holders of the 1,943 bonds sold in Europe shall accept these terms and fund all their coupons for the period stated; and in case any of the holders of these bonds refuse to assent to this arrangement, I agree to save the company harmless against any proceeding that may be taken thereon. It is understood that this agreement shall in no way affect my present rights in regard to the collaterals placed in my hands to secure a loan made by me to the company in July last.

Yours, very resp'y,

GEORGE PEABODY.

347 *Ex. E, on the part of Peabody & Co., Dec'r* 23, 1861.—W. M.

[Copy.]

Memorandum of an agreement made in New York this third day of July, A. D. 1855, between George Peabody & Co., of London, bankers, party of the first part; the Ohio and Mississippi Railroad Company, a corporation chartered by the States of Ohio and Indiana, party of the second part; and Abner T. Ellis and Charles W. West, both of the city of Cincinnati, parties of the third part.

Whereas the parties of the first part heretofore assisted in the negotiation and sale of the first mortgage bonds of the parties of the second part, commonly known as the first mortgage bonds of the eastern division of the Ohio & Mississippi Railroad, in the city of London:

And whereas the parties of the second part, by reason of their embarrassments, have been unable to provide for the payment of the coupons on said bonds due on the 2d of July current:

And whereas the party of the first part is willing, by reason of the part they had in negotiating said bonds, to purchase the said coupons, in order that the credit of the party of the second part may not be further injured by their going to protest, and to hold them for sixty days, to be further extended four
348 months in case certain arrangements for completing the road now in progress are carried out, the parties of the second part paying interest on said coupons at the rate of seven per cent. per annum from maturity till payment, and giving certain further security as hereinafter provided:

And whereas the parties of the second part are engaged in perfecting arrangements for completing their road, and the parties of the third part have agreed to undertake to procure good individual security to the amount of twenty thousand dollars towards purchasing the said coupons of the party of the first part hereafter, with the expectation on their part that such arrangements will be completed:

And whereas the second parties have hypothecated to James Lee & Co. a number of Knox and Davies county bonds to secure certain advances made on them by said James Lee & Co., and have this day made an assignment of all the said county bonds subject to said advances to Duncan, Sherman & Co., agents for the party of the first part as part, of the additional security to be given under the terms of the agreement herein recited, and the said Duncan Sherman & Co., as such agents, have this day purchased a large number of such coupons on the behalf of the party of the first part, by virtue of this
349 agreement, before the same could be reduced to writing:

Now this memorandum witnesseth, that the first party hath undertaken and undertakes to purchase such coupons of said first mortgage bonds to the amount of fifty thousand dollars in all, including those already purchased; and then when the parties of the third part shall furnish the note or notes for twenty thousand dollars hereafter provided for, said note or noets shall be discounted, and the whole proceeds applied to the further purchase of said coupons of said issue, and that they will not present for payment the coupons purchased until the expiration of sixty days; and that in case the said arrangement shall be then perfected, they will not present them for payment until the expiration of four months from that time, and will in that event also permit the parties to the said note or notes to renew the same for four months; and that if the said note or notes shall be paid by the makers or endorsers thereof, and the whole purchase-money of all the coupons purchased by the first party shall be reimbursed, with interest, as aforesaid, they will deliver said coupons to said third parties, and also all collaterals which they *which they* may then hold, to
350 secure the reimbursement of the money expended in such purchase.

Said second parties undertake to complete the arrangements for furnishing their road; ratify and confirm the assignment of the said Knox and Davies county bonds to the first party, subject to said advances; agree to pay interest on the said coupons to whomsoever may hold them as if presented and protested, and assent to the transfer both of them and the remaining collateral for the benefit of the parties to the said note or notes for twenty thousand dollars whenever the first party shall be fully reimbursed principal and interest.

Said third parties agree to endeavor to procure, as soon as possible, a note or notes for twenty thousand dollars, signed by themselves and others, directors of the said Ohio & Mississippi Railroad Company, and satisfactory to Duncan, Sherman & Co., payable at the office of Duncan, Sherman & Co., in New York, in sixty days, and present the same to them for discount, the proceeds to be applied as above, and to do the same in case of renewal as above provided for, the renewal note to be equally satisfactory to Duncan, Sherman & Co.

In witness whereof, the parties have hereunto set their hands and corpo-
351 rate name, respectively—The party of the first part by Duncan, Sherman & Co., their agents duly accredited; the party of the second part by Abner T. Ellis and Charles W. West, members of the finance committee of the board of directors of said corporation duly authorized; and the parties of the third part, each by his own hand.

(Signed) GEORGE PEABODY & CO,
By DUNCAN, SHERMAN & CO.
(Signed) THE OHIO & MISSISSIPPI RAILROAD CO.,
By ABNER T. ELLIS, } *Of the Finance Committee.*
C. W. WEST, }
ABNER T. ELLIS.
C. W. WEST.

Signed and interchanged in presence of—
(Signed) J. C. BANCROFT DAVIS.

[Copy.]

F, on the part of Peabody & Co., Dec'r 23d, 1861.—W. M.

Messrs. DUNCAN, SHERMAN & Co.:

GENT.: I find that Judge Ellis and Mr. West are entirely unable to make any arrangement for the payment of the July interest on the 1st mort. bonds.

They can only offer the coupons with the Co.'s notes as collaterals, which no one here has interest enough in the bonds to take, though the security is ample.

352 I have easily arranged on the same basis to borrow money on the western div'n, but in that Bacon and all his friends are interested.

I regret that the protest of the coupons has been found necessary, as the parties are all sanguine that their plan to raise the million dollars cash could have been carried out successfully in a few days if this interest were provided for; and this default will render a foreclosure of the 1st mort. inevitable.

Judge Ellis and Mr. West will probably go home to-night or to-morrow.

Yours, truly,

SAMUEL L. M. BARLOW.

June 30th, 1855.

Ex. G. of Peabody & Co., Dec'r 24, 1861.—W. M.

OFFICE OF DUNCAN, SHERMAN & COMP'Y, BANKERS,
New York, Sep. 27th, 1861.

J. P. MORGAN, Esq.,
Attorney for Messrs. George Peabody & Co.—Present.

DEAR SIR: We beg to hand you herein—

55	coupons	No.	101	to	155	20	coupons	No.	1531 to 1550
15	"	"	161	"	175	34	"	"	1561 " 1594
5	"	"	191	"	195	1	"	"	1598
2	coupons	"	202	and	204	158	"	"	1601 " 1758
353 30	"	"	208	to	237	93	"	"	1772 " 1864
3	"	"	241	"	243	39	"	"	1872 " 1910
70	coupons	"	247	"	316	15	"	"	1918 " 1932
175	"	"	322	"	496	5	"	"	1938 " 1942
318	"	"	498	"	815	49	"	"	1945 " 1993
24	"	"	819	"	842	19	"	"	1996 " 2014
653	"	"	851	"	1503	31	"	"	2020 " 2050
5	"	"	1596	"	1510				
10	"	"	1516	"	1525	1829	coupons.		

Say, one thousand eight hundred and twenty-nine, of thirty-five dollars each, of the Ohio & Miss. railroad, due 1st of July, 1855, being portion of those to pay which you advanced the money under the agreement made between us, acting on your behalf and Mess. West & Ellis, financial committee of the Ohio & Mississippi railroad, which agreement was dated July 3d, 1855.

Your obedient servants,

DUNCAN SHERMAN & CO.

Circuit court of the U. S., southern district of Ohio.

EDWIN D. MORGAN *& al.*
against
THE OHIO & MISS. RAILROAD CO. *& al.*

It is hereby mutually consented and stipulated between all of the
354 different parties appearing in this action—

That the testimony of any witnesses residing outside of the State of Ohio, and in the United States of America, be taken, at the instance of any party to the action, before Hon. William Mitchell, in the city of New York, who is hereby appointed a commissioner for that purpose, in giving a ten days' notice by mail to the solicitor for the Ohio and Mississippi railroad and the solicitor for the complainants, if taken on the part of the defendant, George Peabody & Co., and on giving a like notice to the solicitors of George Peabody & Co., if taken on the part of any other defendant or the complainant.

That the testimony of any witness residing in Europe be taken, at the instance of any party, before the consul of the United States in London, who is hereby appointed a commissioner for that purpose, upon a written commission with interrogatories to be propounded by the solicitors for George Peabody & Co., and further interrogatories or cross-interrogatories, or both, to be propounded by the solicitor for the defendant, the Ohio and Mississippi Railroad Company, providing they serve any such interrogatories or cross-interrogatories upon the solicitor for George Peabody & Co. within twenty days after
355 the service upon them by mail of a copy of said commission and interrogatories.

That the testimony of each witness as taken be separately reduced to writing, subscribed by the witness, and sworn to before the commissioner named in the commission, who shall thereupon sign his name and affix his seal thereto, and deliver it to the solicitor of the party at whose instance the same was taken.

That such testimony so taken by one party shall be produced at the trial at the call of any other party if he may desire to offer it in evidence.

That such testimony shall be read in evidence at the trial of this cause without further proof, and with the same effect, and subject to the same objections, as though the witnesses were severally present, sworn and examined in court at the trial, and had testified as in said testimony set forth December 3d, 1861.

WARE & DISNEY,
Solicitors for the City of Cincinnati.

356 Depositions of witnesses produced, sworn and examined, on the days hereinafter stated, at the consulate of the United States of America at London, in that part of the kingdom of Great Britain and Ireland called England, under and by virtue of the annexed commission issued out of the United States circuit court for the southern district of Ohio, United States aforesaid, to take depositions in a certain cause therein pending and at issue, between Edwin D. Morgan and others and the Ohio & Mississippi Railroad Company and others.

George Peabody, aged sixty-seven years and upwards, being duly and publicly sworn and examined on the part of the defendants, doth depose as follows:

First. To the first interrogatory he saith: His place of residence is the Palace Hotel, Buckingham Gate, London; his business that of merchant and banker; and his place is 22 Old Broad street, in the city of London; he has been in business in London, in such business, since 1837.

Second. To the second interrogatory he saith: I know that there is such a company as the Ohio and Mississippi Railroad Company, eastern and western divisions, and have had knowledge of them since 1853. I have had no direct transactions with the company, but in July, 1855, through Duncan, Sher-
357 man & Company, my house made a loan to them, under my guarantee, to the extent of about sixty-eight thousand dollars, ($68,000,) the security for the same being, primarily, the first mortgage bonds coupons, eastern division, due 1st July, 1855. In 1853 I assisted in the sale of a large amount of the first mortgage bonds of that company in London for an American house—Page & Bacon—but do not know whether such sale was for themselves or the company.

Third. To the third interrogatory he saith: This interrogatory is answered in the answer to the second interrogatory.

Fourth. To the fourth interrogatory he saith: The letter marked Ex. A, dated 13 June, 1855, is in the handwriting of Samuel L. M. Barlow. I know it is so from having frequently seen him write. The letter was received by me in the usual course of mail, and the name "Barlow" over the date is in my handwriting. Mr. Barlow, it was understood, was acting as agent for the eastern division of the Ohio & Mississippi Railroad Company, and president of one or both divisions. I had anticipated a request made by Mr. Barlow, by having given Messrs. Duncan, Sherman & Company discretionary powers with regard to the protection of the coupons then about falling due, (1st July, 1855.)
358 if the company was unable to pay them, which resulted in the advance of money, under the agreement made by them, dated 3 July, 1855. The letter to Messrs. Duncan, Sherman & Company was a private one, dated, I think, about the 10th of June. I have no copy, but doubtless Messrs. Duncan, Sherman & Company can furnish the original. I am certain that I gave no instructions to advance any money to pay those coupons, except on the security of the coupons themselves.

Fifth. To the fifth interrogatory he saith: My answer to the fourth contains nearly all that is required by this interrogatory. The entire sum advanced by Messrs. Duncan, Sherman & Co., under the agreement dated the 3 July, 1855, is still due; no part of principal or interest has been paid.

Sixth. To the sixth interrogatory he saith: I recollect receiving printed copies of the letter dated 9th April, 1856, marked Ex. C, signed by Mr. Barlow, and that of the thirteenth of the same month, signed by Mr. Davis, about the time of their date, but no original, as they doubtless were printed for circulation among the bondholders by those gentlemen, or Messrs. Capel Humphrey, without any but verbal previous communication with my firm. The two gen-
359 tlemen named were then in London, acting, as it was understood, in behalf of the Ohio and Mississippi Railroad Company; but their principal negotiations were with Messrs. Capel & Company, who represented, on behalf of friends, about two-thirds of the first mortgage bonds.

Seventh. To the seventh interrogatory he saith: The paper signed by me, dated 17 April, 1856, marked Ex. D, is a press copy of a letter addressed to Mr. Barlow, the original of which I handed to him at the time. Mr. Barlow had stated to me that, to enable him to procure means to finish the road, it was indispensable that all the coupons mentioned in his circular of the 9th of April, (coupons from 1st July, 1855, to *to* 1st July, 1858,) should be funded, and as the bondholders could not all be conferred with before his return to New York, he asked me to guarantee the conversion. After consulting with Messrs. Capel & Co., and ascertaining that a conversion of nearly all could be calculated upon, I agreed to guarantee the conversion of all, on condition that Mr. Barlow would guarantee to me to the extent of half of one hundred thousand dollars, should bondholders to that extent not agree to convert. A *A* copy of the latter guarantee, marked B 1, is annexed.

360 Eighth. To the eighth interrogatory he saith: The collaterals in the hands of Duncan, Sherman & Co., to secure the money advanced by them for account of my firm, under the before-stated agreement, dated the 3d of July, 1855, consisted of coupons due 1 of July, 1855, and an order of James Lee, of New York, for any surplus (if there should be any) on the sale of one hundred and seventy-three thousand dollars of county bonds, on which he had advanced about fifteen thousand pounds. I always refused to pay the advance and take the one hundred and seventy-three thousand dollar bonds, and never considered this part of the collateral as of much consequence. It was the security of the coupons placed with Messrs. Duncan, Duncan, and Sherman & Company that I relied upon to make the debt quite secure. Mr. Barlow wrote

the letter dated, 17 April, 1856, marked E D, in a room adjoining my private office, and brought to me for signature the first paragraph only. On reading it I at once said that it might interfere with the coupons held as collateral in hands of Duncan, Sherman & Company, although only those due sub-
361 jected to them were asked to be converted, and I positively refused to sign the letter till he added the clause protecting those coupons from conversion. The order upon James Lee was never named by Mr. Barlow to me, or by me to Mr. Barlow, the entire letter referring to coupons and nothing else.

Ninth. To the ninth interrogatory he saith: The one hundred and seventy-three thousand dollars were, I believe, Knox and Davies county bonds, and have been sold by James Lee for just the amount of his claim.

Tenth. To the tenth interrogatory he saith: I know of no other matter or thing which will strengthen the answers I have here given in connexion with the documents annexed.

First. To the first cross-interrogatory he saith: Referring to my answer to the second direct interrogatory, I have to state that out of about nineteen hundred and fifty thousand first mortgage bonds, eastern division of the Ohio and Mississippi railroad, negotiated in London, about twelve hundred thousand dollars were sold by Messrs. Capel & Co. to their friends, and the remainder by my house. Neither myself or firm retained any part. My firm has
362 occasionally bought and sold some of these bonds, and on the 17th of April, 1856, they and myself held the amount of six thousand dollars only. My firm is constantly in the habit of buying coupons due in New York fifteen or twenty days before they fall due, and it purchased in June, 1855, about four hundred of the coupons of the Ohio and Mississippi railroad, (eastern division,) due the 1st July, 1855, but at the same price at which United States coupons were selling; taking, however, in most cases, an obligation from the seller to take them back and refund the money if unpaid when due.

Second. To the second cross-interrogatory he saith: Referring to the answer I have given to the fourth direct interrogatory regarding the printed circulars, I have no recollection of seeing either of them in manuscript; and if shown at all, for correction or alteration, it would have been to Messrs. Capel & Company, and not to me or my firm, as Messrs. Capel & Company carried on the entire negotiation with Messrs. Davis and Barlow. Neither myself or firm wrote any letters to continental holders of Ohio and Mississippi railroad bonds recommending conversion of coupons, nor did we send the circular to bond-
363 holders asking assent to the finding, the exchange of bonds for said coupons having been attended to exclusively by Messrs. Capel & Company. I did not hesitate to recommend any personal friends who asked me to convert the coupons, believing, from Mr. Barlow and Mr. Davis's representation, that such conversion would insure prompt payment of future interest.

Third. To the third cross-interrogatory he saith: Referring to my answer to the seventh direct interrogatory, referring to my letter dated 17 April, 1856, marked Ex. D, I was not informed by any one that without this letter or guarantee a contract for the purchase of iron rails could not be accomplished on behalf of the associates, William H. Aspinwall and others.

Fourth. To the fourth cross-interrogatory he saith: Part of this interrogatory is answered in the 7th direct interrogatory. I did not say that the sole object of Mr. Barlow's guarantee to me was to prevent the associates in New York from relying wholly upon my guarantee, and to prevent them from turning the coupon holders over to me for payment; I said no such thing, but Mr. Barlow promised to resist the payment of any of the coupons (asked to be con-
364 verted) by every legal means, as stated in his letter of guarantee dated 9th of April.

Fifth. To the fifth cross-interrogatory he saith: Mr. Barlow said no more to me than I have stated in reply to the seventh direct interrogatory relative to

any contract or agreement with the associates. I saw no letter of authority held by said Barlow from the associates. Mr. C. M. Lampson made a contract in the name of my firm with Mr. Barlow for the delivery of iron rails, in which other parties were interested, that of my firm being only one-fourth. The contract was signed the 8th day of April, 1856. Negotiations for the sale had been for some days under consideration, but I cannot tell the day or hour of the day when it was matured, or where. The contract was sent by Mr. Lampson to Messrs. Choutau, Sandford & Company, New York, who were one-half interested in it. It can, doubtless, be seen, on application to that house, but neither myself or my firm has any copy of it.

GEORGE PEABODY.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this thirtieth day of April, A. D. 1862, before,

F. H. MORSE, *Commissioner.*

[Copy.]

B. 1.] LONDON, *April* 17, 1856.

GEORGE PEABODY, Esq.:

365 MY DEAR SIR: In case you are obliged, under your guarantee of this date, to pay the coupons on one hundred thousand dollars of bonds for the period stated in my letter to your firm of the 9th inst., which would amount to the sum of $17,500, I agree to bear one-half of the amount, say $8,750, personally.

I do not believe that you will find any great difficulty with the bondholders; and if any of them insist upon payment, I will join you in all proper attempts to coerce an acceptance of my proposition of the 9th inst.

I will also give my personal attention to resisting any payment of these coupons, in case of suits brought against the company, it being understood that if you are obliged to pay coupons on more than $100,000 of the bonds, that this excess is assumed by you alone.

Yours, very truly,

(Signed) SAMUEL L. M. BARLOW.

At the execution of a commission for the examination of witnesses between Edwin D. Morgan and others and the Ohio and Mississippi Railroad Company and others, this paper writing was produced and shown to George Peabody, and by deposed unto, at the time of the examination, before,

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Junius Spencer Mongan, aged forty-nine years and upwards, being duly and publicly sworn and examined on the part of the defendants, doth depose and say as follows:

366 First. To the first interrogatory he saith: His place of residence is 13 Prince's Gate, Hyde Park; his business that of merchant and banker; he has been in that business, in the city of London, about eight years.

Second. To the second interrogatory he saith: I know the Ohio and Mississippi, and have had, since 1854, some knowledge of it. My firm, in July, 1855, made that company a loan of money to the extent of about sixty-eight thousand dollars.

Third. To the third interrogatory: This interrogatory is already answered by the second interrogatory.

Fourth. I believe the letter marked Exhibit A to be in the handwriting of Samuel L. M. Barlow; I so from being familiar with his handwriting; I understood him to be acting as agent of the Ohio and Mississippi Railroad Company. I had nothing to do with the transaction, the negotiation being between Mr. Barlow and Mr. Peabody.

Fifth. To the fifth interrogatory he saith: I must give the same answer to his interrogatory as I have given to the preceding one.

Sixth. To the sixth interrogatory he saith: I have seen such paper
367 before, but cannot say at what time or under what circumstances. The two gentlemen named were in London about that time, but the negotiation to which the papers refers was made through Messrs. Capel & Company, of London, as agents for most of the foreign holders of the first mortgage bonds of the Ohio and Mississippi Railroad Company, (eastern division.)

Seventh. To the seventh interrogatory he saith: I believe the letter, referred to in this interrogatory, to be a press copy, the handwriting of Mr. Barlow, and signed by Mr. Peabody. This matter was entirely a transaction between Mr. Peabody and Mr. Barlow, and consequently I am unable to answer the remainder of this interrogatory.

Eighth. To the eighth interrogatory he saith: I, not being conversant with the details referred to in this interrogatory, am unable to answer it.

Ninth. To the ninth interrogatory he saith: I know not.

Tenth. To the tenth interrogatory he saith: I do not now think of any other matter or thing which may tend to my benefit or advantage in this suit.

368 First. To the first cross-interrogatory he saith: No negotiation of bonds of the Ohio and Mississippi Railroad Company have been made by my firm since my connexion with it. My firm bought, in June, 1855, sundry coupons of the Ohio and Mississippi Railroad Company; in all, I believe, about four hundred of those belonging to the eastern division, at the same rate that we were buying coupons of the government, and other bonds, taking, *taking*, as is our invariable custom, the obligation of the seller to refund the money in case of any defalcation in the payment; which coupons are sent to Duncan, Sherman & Company, in New York, for collection. I annex press copy of our letter of 22d June, 1853, marked B 2, which enclosed the larger part of I. S. M. said coupons. The letter of 13 of June, 1855, not being addressed to me or my firm, I cannot give the date of its reception.

Second. To the second cross-interrogatory he saith: I have no recollection of any of the matters stated in this interrogatory.

Third. To the third cross-interrogatory he saith: I have no information of the subject of this interrogatory.

369 Fourth. To the fourth cross-interrogatory he saith: I have no information of the subject of this interrogatory.

Fifth. To the fifth cross-interrogatory he saith: I have no recollection of ever having seen the letter of authority referred to, nor of any conversation with Mr. Barlow or any other person upon the matters referred to. Mr. C. M. Lampson made a contract with Mr. Barlow for the delivery of iron rails, in which contract my firm had an interest. The contract was signed the 8th of April, 1856, but at what hour I cannot state. The other parties interested in the contract were Messrs. Chouteau, Sandford & Company, of New York, and Mr. C. M. Sampson, of London, with whom my firm had been interested in the purchase and sale of rails for years.

J. S. MORGAN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this second day of January, 1862, before

FREEMAN H. MORSE, *Commissioner.*

B 2.

[Pr. American steamer]

London, 22d June, 1855.

Messrs. DUNCAN, SHERMAN & Co., *New York:*

370 DEAR SIRS: Annexed you have particulare of sundry coupons,

amounting to $16,955, which we send by the mail, under a separate cover, to your address, and which please collect and remit for as usual.

Very truly yours,

GEO. PEABODY & CO.

Charles Cubitt Gooch, aged fifty years and upwards, being duly and publicly sworn and examined on the part of the defendants, doth depose and say as follows:

First. To the first interrogatory he saith: His place of residence is 39 Westbourne Terrace, London; his business is that of banker and merchant; he has been in such business ten years in the city of London.

Second. To the second interrogatory he saith: I know that my firm has had business transactions with the Ohio and Mississippi Railroad Company, but I have not personally attended to it, nor have I any definite knowledge of it.

Third. To the third interrogatory he saith: This interrogatory is answered in my answer to the second interrogatory.

Fourth. To the fourth interrogatory he saith: I know not.

371 Fifth. To the fifth interrogatory he saith: Not having personally attended to the business, I cannot authentically answer this question.

Sixth. To the sixth interrogatory he saith: I may have seen the paper, but have no definite knowledge of the matter of this interrogatory.

Seventh. To the seventh interrogatory he saith: I have looked at the paper referred to and marked Ex. D; it is a press copy, signed by Mr. George Peabody. To the remainder of this interrogatory I say I know not.

Eighth. To the eighth interrogatory he saith: I know not, having given no personal attention to it.

Ninth. To the ninth interrogatory he saith: I have no knowledge of the subject.

Tenth. To the tenth interrogatory he saith: I do not know of any other matter or thing which may tend to my benefit or advantage in this suit; but I have to state that I am not at all intimately acquainted with any portion of the business connexion of my firm with the Ohio and Mississippi Railroad Company, the whole of it having been almost exclusively transacted by my senior partner, George Peabody, and that also being a branch of the business

372 of my firm that does not come under my notice, in consequence of our system of subdivision of labor.

First. To the first cross-interrogatory he saith: I cannot do more than refer to the answer I have given to the second direct interrogatory.

Second. To the second cross-interrogatory he saith: I have no knowledge of the matters referred to in this interrogatory.

Third. To the third interrogatory (cross) he saith: I know not.

Fourth. To the fourth interrogatory (cross) he saith: I know not.

Fifth. To the fifth cross-interrogatory he saith: I know that Mr. Lampson made some contract in which my firm had an interest, but the precise particulars I do not now remember.

C. C. GOOCH.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this third day of May, A. D. 1862, before

FREEMAN H. MORSE, [SEAL.]
Commissioner.

Entry allowing N. C. McLean $2,000 counsel fees.

373 Afterwards, to wit, on the nineteenth day of June, A. D. 1862, it being of the special and adjourned term of June of the court aforesaid, for the year last aforesaid, this cause came on for further hearing; and thereupon

the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. Morgan & Co.
vs.
The Ohio & Miss. R. R. Co. *et al.* } In chancery.

On motion to the court in this cause, it is ordered that Joseph W. Alsop, esq., out of any funds in his hands, as receiver, pay to N. C. McLean, esq., two thousand dollars, in full of his counsel fees in this cause.

Entry vacating part of decree of Ap'l T. 1861, *and allowing Cin'ti to answer.*

Afterwards, to wit, on the 24th day of June, A. D. 1862, it being of the term last aforesaid, for the year last aforesaid, this cause came on for further hearing; and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. Morgan *et al.*
vs.
The Ohio and Mississippi R. R'd Co. *et al.* } Chancery.

On motion of the city of Cincinnati, by Messrs. Ware and Stanberry, counsel for said city, and after argument and due consideration, it is ordered by the court here that so much of the decree rendered in this cause at the April
374 term, 1861, of this court, so far as the same takes the bill pro confesso against the said city of Cincinnati, and so far as the same affects the rights of said city, be vacated and set aside, and leave is given to said city of Cincinnati to file an answer in this case without prejudice from said decree.

Receiver's twenty-fifth monthly report.

Afterwards, to wit, on the 28th day of June, A. D. 1862, there was filed in the office of the clerk of the court aforesaid the receiver's 25th monthly report in the premises, which report is in the words and figures following, to wit:

Twenty-fifth monthly report of Joseph W. Alsop, receiver of the Ohio & Mississippi Railroad Company, for April, 1862.

Balance from March ac		$12,156 50
Receipts:		
From Adams Express Co. for March	$2,054 96	
" passengers prior to 1st April	19,862 53	
" freight " " "	39,808 95	
" mail service for the quarter ending March 31st, 1862	10,856 10	
		72,582 54
" passengers on April acc't	21,442 92	
" freight " "	37,417 50	
		58,860 42
" other sources, rents, &c		467 85
		144,067 31
Disbursements:		
Paid charges advanced to other roads	7,102 34	
Paid interest and discounts	254 45	
375 " sundry office expenses	457 38	
" on acc't of new cars built	1,399 86	

Paid on acc't of extraordinary bridge repairs	$15,000 00	
" fees on acc't of foreclosure suit	454 30	
" on acc't of former arrearages	12,135 75	
" on acc't of March current expenses	49,631 07	
" on acc't of April do.	258 96	
		$86,695 11
Balance carried to May account		57,372 20

JOS. W. ALSOP, *Receiver.*

Receiver's twenty-sixth monthly report.

Afterwards, to wit, on the 21st day of October, A. D. 1862, there was filed in the office of the court aforesaid the receiver's 26th, 27th, 28th and 29th monthly reports in the premises, which reports are in the words and figures following, to wit:

Twenty-sixth monthly report of Joseph W. Alsop, receiver of the Ohio & Mississippi Railroad Co., for May, 1862.

Balance from April account		$57,372 20
Receipts:		
From Adams Express for April	$1,952 46	
" passengers prior to 1st May	7,511 71	
" freight " " "	19,761 21	
		29,225 38
" passengers on May acc't	20,422 34	
" freight " "	32,393 03	
		52,815 37
376 From amount received of U. S. gov't, held for settlement with other roads		41,194 24
From other sources, (balance)		4 79
		180,611 98
Disbursements:		
Paid charges advanced in acc't with other roads	$1,785 79	
" sundry office expenses	30 30	
" interest and discount	158 28	
" on acc't of new cars purchased	1,407 88	
" on acc't of temporary loan	11,000 00	
" on acc't of former arrearages	7,214 07	
" on acc't of rent of rolling power, locomotive, and cars	27,000 00	
" on acc't of April current expenses	49,995 56	
" on acc't of May " "	15,442 63	
		114,034 51
Balance carried to June account		66,577 47

JOS. W. ALSOP, *Receiver.*

Receiver's twenty-seventh monthly report.

Twenty-seventh monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi R. R. Co., for June, 1862.

Balance from May acc	$66,577 47

Receipts:

From Adams's Express Co. for May	$1,835 63		
" passengers prior to June 1st	4,886 18		
" freight " "	20,003 38		
		$26,725 19	
377 From passengers on June acc	34,583 04		
From freight " "	34,843 69		
		96,426 73	
From charges received on former advances		1,533 62	
" other sources, rents, &c		686 37	
		164,949 38	

Disbursements:

Paid interest and discount	$7 30	
" fees on foreclosure suit	1,561 44	
" on ac. new flat cars purchased	1,415 90	
" United States government in settlement of ac	36,794 88	
" on acc't of former arrearages	13,955 68	
" on acc't of hire of rolling stock	15,000 00	
" on acc't of May current expenses	57,622 45	
" on acc't of June " "	6,419 19	
		132,776 84
Balance carried to July ac		32,172 54

JOS. W. ALSOP, *Receiver.*

Receiver's twenty-eighth monthly report.

Twenty-eighth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi R. R. Co., for July, 1862.

Balance from June acc't		$32,172 54

Receipts:

From Adams's Express Co., for June	$1,727 89		
" passengers, prior to July 1st	10,052 48		
From freight " " "	17,400 12		
378 " mail service to 30th June, '62	1,320 45		
		30,500 94	
From passengers on July acc't	21,299 00		
" freight " "	31,873 51		
		53,172 51	
" charges received on former advances		2,248 05	
" other sources, rents, &c		391 70	
		118,485 74	

Disbursements:

Paid interest and discount	$255 96	
" fees on account of foreclosure suit	2,000 00	
" sundry office expenses	190 95	
" on acc't of new cars purchased	1,423 92	
" United States government in settlement of ac't.	2,299 36	
" on acc't of temporary loan	10,000 00	
" on acc't of former arrearages	8,463 64	

Paid on acc't of June current expenses	$60,713 52	
" on acc't of July "	12,059 36	
		$97,406 71
Balance carried to August acc't		21,079 03

JOS. W. ALSOP, *Receiver.*

Receiver's twenty-ninth monthly report.

Twenty-ninth monthly report of Joseph W. Alsop, receiver of the Ohio and Mississippi Railroad Co., August, 1862.

Balance from July acc't		$21,079 03
Receipts:		
From Adams's Express Co., for July	$1,822 43	
379 " passengers prior to 1st August	11,738 71	
" freight " "	18,471 97	
From mail service, balance to 30th June	9,535 69	
		41,568 80
" passengers on August acc't	24,849 86	
" freight " " "	37,050 27	
		61,900 13
" other sources		238 55
		124,786 51
Disbursements:		
Paid charges—advances to other roads	$2,210 88	
" on acc't of temporary loan	5,000 00	
" on sundry office expenses	18 85	
" on acc't of new cars purchased	1,431 94	
" on acc't of former arrearages	10,529 44	
" on acc't of July current expenses	37,901 67	
" on acc't of August "	32,366 96	
		89,459 74
Balance carried to Sept. ac		35,326 77

JOS. W. ALSOP, *Receiver.*

Afterwards, to wit, on the 25th day of October, A. D. 1862, it being of the October term of the court aforesaid for the year last aforesaid, this cause came on for further hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

Decree.

EDWIN D. MORGAN and others
vs.
380 THE OHIO AND MISSISSIPPI RAILROAD COMPANY, Edward D. Mansfield and George Hoadly, trustees; George Peabody, Junius S. Morgan, & Charles C. Gooch, partners, under the name of George Peabody & Co., and others. } Chancery.—1284.

This cause came on for further hearing at this term upon the original and amended bills, the answer of George Peabody & Company, and the exhibits and testimony and proofs in the cause, and was argued by counsel; and the court,

on consideration, find the equity of the case with the said George Peabody & Co., and that they are entitled to the relief sought by them in their answer.

And the court find, that at the instance and request of the defendant, the Ohio and Mississippi Railroad Company, the said firm of George Peabody & Co. purchased and redeemed the coupons given for interest on the first-mortgage bonds issued by said railroad company, and secured by the mortgage of said company, dated May 24, 1852, and executed and delivered June 10, 1852, and duly recorded, which coupons became due and payable on the first day of July, 1855, to the amount of sixty-eight thousand one hundred and forty-five dollars, and prior to the maturity of any portion of the sum of $215,145
381 of interest on said first-mortgage bonds as found by the decree of this court, entered in this cause on the 29th day of April, 1861.

And the court further find that said purchase and redemption of said coupons by said George Peabody & Co. was made by them under and by virtue of an agreement in writing, dated July 3d, 1855, made and entered into by and between said Ohio and Mississippi Railroad Company of the one part, the said George Peabody & Co., by Duncan, Sherman & Co., their agents, of another part, and Abner T. Ellis and Charles W. West of the other part, which agreement was made in the city of New York, and is fully set forth in the answer of said George Peabody & Co., whereby the said George Peabody & Co. were entitled to assert the same as liens under said first mortgage in the same manner and to the same effect as the said coupons stood in point of priority at the date of said purchase and redemption, and that said coupons so purchased and redeemed by said George Peabody & Co. constitute the first and best lien on the property secured by said first-mortgage deed.

And the court further find that there was due to the said George Peabody & Co., from the said the Ohio and Mississippi Railroad Company, on the 1st day of January, 1861, for principal and interrst on the said coupons so by them purchased and redeemed, the sum of ninety-four thousand two hundred and
382 eighty dollars and eighty-two cents, ($94,280 82,) with interest from said date, at the rate of seven per centum per annum.

It is therefore ordered, adjudged, and decreed that the said the Ohio and Mississippi Railroad Company, within thirty days from the entry of this decree, pay to the said George Peabody & Co., or to their solicitors, the said sum so found due as aforesaid, with interest as aforesaid, and the costs herein to be taxed, and in default of such payment within said time, the premises and property covered by said first mortgage to be sold in the manner provided in said former decree; and it is further ordered that said decree be amended and modified so as to conform to the finding and provisions of this decree, and that on distribution of the proceeds of said sale said sum, with interest hereinbefore found due to said Peabody & Co., be paid next after the payment of the costs and expenses of this suit, and in preference to all other claims upon the receipt of their solicitors; and it is further ordered that the order of this court made and entered in this cause on the 18th day of September, 1861, staying the sale of the said railroad and other property, be and the same is hereby rescinded; and the said trustees, named in said decree for that purpose, are hereby ordered to proceed and sell the premises mortgaged in pursuance of the terms of said decree as now amended.

383 Afterwards, to wit, on the 5th day of November, A. D. 1862, it being of the October term of the court aforesaid for the year last aforesaid, this cause came on for final hearing, and thereupon the court ordered the following entry to be made in the premises, which entry is in the words and figures following, to wit:

E. D. Morgan & Co.
vs.
The O. and Miss. R. R. Co. & *al.* } Chancery.—1284.

This cause came on again to be heard upon the bill of the complainants, the answer of the defendant, the city of Cincinnati, the exhibits and proofs, and was argued by counsel.

And the court being fully advised in the premises, find that the city of Cincinnati has no lien whatever upon the railroad track and appendages of the defendant, the Ohio and Mississippi Railroad Company, and has no lien whatever upon any property of the said company, other than the stock held under hypothecation, by reason of any of the matters set up in the answer of the said city.

Wherefore it is ordered, adjudged, and decreed that the said city of Cincinnati is not entitled to any modification of the decree rendered in this cause on the 20th day of April, A. D. 1861; and that, as to the matters alleged in the
384 answer of the said city of Cincinnati, the said decree of April term, 1861, be and remain in full force without modification. And thereupon came the complainants, and the said defendant, the city of Cincinnati, and prayed the court for an allowance of an appeal from said decree, and the same is allowed and granted by the court; and it is further certified that the other defendants, though notified so to do, refuse to join in the said appeal so taken by the said city of Cincinnati; and it is further ordered by the court that one transcript of the record be made by the clerk to serve for both the appeals taken by said city of Cincinnati and the said complainant.

Bond filed.

385 Circuit court of the United States, southern district of Ohio.

E. D. Morgan *et al.*
vs.
The Ohio and Mississippi Railroad Co. *et al.* } In chancery.—1284.

The following exhibits were made by the city of Cincinnati at the hearing of the case, and admitted as such, and ordered by the court to be made part of the decree, to wit: Exhibits A, B, C, D, E, F, G and H.

386 *Exhibit A.—Extract from the minutes,*

Council Chamber, *Cincinnati, Sept.* 20, 1850.

Mr. Hiff, from the committee on roads and canals, made a report in favor of loaning $600,000 to the Ohio & Mississippi Railroad Company or to the Central Railroad Company, $150,000 to the Hamilton and Eaton Railroad Company, $100,000 to the Covington and Lexington Railroad Company, and $150,000 to the Cincinnati and Belpre Railroad Company.

Mr. Longshore moved to strike out so much as relates to the central route; which was carried by the following vote: yeas 17, nays 16.

Mr. Sargeant moved to strike out all the amount and insert $800,000 to the Ohio and Mississippi Railroad Company, $100,000 to the Hamilton and Eaton ditto, $100,000 to the Cincinnati and Belpre ditto; which was lost by the following vote; yeas 12, nays 21.

Mr. Cassilly called for the previous question; which was ordered by the following vote: yeas 18, nays 15.

The question then being on the report being amended, being as follows:

Whereas, at the present day, the means of rapid and easy communication by railway between the chief centres of population and trade in any country and the more remote parts thereof are becoming not merely advantageous, but

387 essential to its advancement and prosperity; and whereas experience has shown, that whatever be the case in long-settled, populous and wealthy countries, in those in which capital is scarce the assistance of governments and corporations is necessary, and may be safely afforded to the construction of lines of railroads, and that such assistance is best given by extending to the companies loans of the corporation or government credits, under such proper conditions as will render the impovement advantageous to the city or country, and with such securities as will secure the payment of the loans: Therefore,

Be it resolved, that the question be submitted to the qualified voters of the city of Cincinnati at the next autumnal election to be held on the second Monday of October next, and the mayor be directed to issue his proclamation for said election, as to whether the city council shall issue and loan the bonds of the city to the various railroad companies, in the several amounts and under the conditions as hereinafter mentioned, in accordance with an act passed by the general assembly of the State of Ohio, March 20th, 1850, entitled "An act to authorize the city of Cincinnati to loan its credit to railroad companies," and that notice be given by advertisement of the resolutions, and copy of said act, in the five following papers, viz: the Enquirer, Gazette, Volksblatt, Times and Commercial, for at least ten days previous to said autumnal election.

388 The said loans to be made as follows, viz: $600,000 to the Ohio and Mississippi Railroad Company, the bonds to be issued and loaned at such times and in such amounts as required, where the directors have expended an equal amount upon its construction, and the whole amount of bonds issued and loaned not to exceed the amount of capital stock subscribed, until the stock so subscribed shall at least amount to the sum of $400,000, subscribed by good and solvent subscribers; and the city shall be secured by a mortgage upon such property of the company as the city council shall require, provided the company shall make satisfactory provision for the punctual payment of the interest upon the bonds so loaned, to be paid in cash at the same time and place as the coupons of said bonds; provided further, that a majority of the directors shall be citizens of Hamilton county for the first year after said loan or any part thereof shall be made, and so long thereafter as the amount of stock subscribed in Hamilton county together with the loan of the city, shall exceed the amount subscribed out of the State, and that all moneys raised by subscription of stock, or by the loan of the city, shall be appropriated directly to the construction and equipment of the road and necessary depots, in the straightest practicable line from the Cincinnati terminus westwardly, excepting the amount necessary for the right of way, incidental and engineering

389 expenses; $150,000 to the Hamilton and Eaton railroad, $100,000 to the Covington and Lexington railroad, and to the Belpre and Cincinnati railroad $150,000, provided the last-named railroad connects itself with the Cincinnati and Hillsborough railroad, at or near the town of Hillsborough. The bonds to be issued and loaned in such amounts as required, when the directors of said roads shall have expended an equal amount upon their construction, and have given to the city council good and satisfactory security by mortgage upon said roads for the prompt payment of said loans; provided they also make satisfactory provision for the payment of the interest on the bonds so loaned, to be paid in cash at the same time and place as the coupons upon said bonds as given by the city; provided further, that all moneys so expended shall be applied to the construction of that part of said road as shall be nearest adjacent to the city.

And be it further resolved, That all bonds so issued for the above-named purposes shall be made payable thirty years after date, bearing an interest of six per cent. per annum; and all bonds, notes and other securities, taken by the city council from any of the above mentioned companies, be made payable, twenty-seven years after the date of each loan.

Resolved further, That the clerk be directed to have ballot-boxes made
390 for the beforementioned companies, and 12,000 ballots for the affirmative, and 12,000 ballots for the negative, upon each question, having upon them Ohio and Mississippi railroad, southern route—for loan, against loan; Cincinnati and Belpre railroad—for loan, against loan; Hamilton and Eaton railroad—for loan, against loan; Covington and Lexington railroad—for loan, against loan.

Mr. Longshore called for a division of the question on each road, which was granted.

The first division being on granting $100,000 to the Covington and Lexington railroad, it was decided in the affirmative by the following vote: yeas 25, nays 8. The second division being on granting $150,000 to the Belpre and Cincinnati railroad, it was decided in the affirmative by the following vote: years 28, nays 5. The third question being on granting $150,000 to the Hamilton and Eaton railroad, it was decided in the affirmative by the following vote: yeas 26, nays 7. The last division being on granting $600,000 to the Ohio and Mississippi railroad, it was decided in the affirmative by the following vote: yeas 25, nays 8. [See minutes, vol. 22, pages 146, 147, 148, and 149.]

391 CITY CLERK'S OFFICE,
City of Cincinnati.

I hereby certify that the foregoing transcripts are correctly copied from the books, papers and journals of the city of Cincinnati, kept under authority and by direction of the city council thereof; the same being marked with numbers, books and pages, to correspond with the records and papers aforesaid.

This certificate is therefore given by authority of the power vested in me, by virtue of the 39th section of the act entitled "An act to provide for the organization of cities and incorporated villages," passed by the general assembly of the State of Ohio, May 3, 1852.

In testimony whereof, I have hereunto set my name and affixed
[SEAL.] the seal of the city clerk's office, this 20th day of October, in the year eighteen hundred and sixty-two.

GEO. M. CASEY,
City Clerk.

392 *Exhibit B.—Extracts from the minutes.*

COUNCIL CHAMBER,
Cincinnati, August 27, 1851.

Mr. Stratton presented a petition from the Ohio and Mississippi Railroad Company for an issue of city bonds, accompanied by the following resolution, which was read and adopted:

Resolved, That the subject be referred to the committee on roads and canals, and they be requested to report to council at the earliest opportunity.

[See minutes, vol. 23, page 374.]

393 *Copy of petition from Ohio and Mississippi Railroad Company.*

OFFICE OHIO & MISSISSIPPI R. R. COMPANY,
Cincinnati, August 27, 1851.

At a meeting of the board of directors of the Ohio and Mississippi Railroad Company, held at their office in Cincinnati, on the twenty-seventh day of August, 1851, the following resolutions were adopted:

Resolved, That notice be given to the city council of the city of Cincinnati, that this company have agreed to the terms and conditions upon which said city council, pursuant to a vote of the people, and an act of the legislature, agreed

to loan its credit to this company, by issuing its bonds to an amount not exceeding six hundred thousand dollars, on certain terms and conditions, as set forth in the resolutions and proceedings of the city council on that subject; that this company hold themselves bound to comply with all the said terms and conditions, and will punctually perform the same; that the capital stock already subscribed, by good and solvent subscribers, amounts to more than $400,000, and measures are in progress to largely increase the subscription of stock; that a majority of the board of directors are now citizens of Hamilton county, Ohio; and that the company are actively proceeding to secure the right of way, to locate and let the road and prosecute the work to completion at the earliest day,

and that due notice will be given to the city council when the progress
394 of the work is such as to entitle them to an issue of the bonds.

Resolved, That the secretary furnish to the president of the city council a copy of the foregoing resolution, duly certified by him, to be laid before the council.

Referred to committee on roads and canals.

CINCINNATI, *August* 27, 1851.

I certify that the foregoing is a true transcript from the records of the proceedings of the board of directors of the Ohio and Mississippi Railroad Company.

SAM'L R. BATES,
Secretary pro tem.

395 CITY CLERK'S OFFICE,
City of Cincinnati.

I hereby certify that the foregoing transcripts are correctly copied from the books, papers and journals of the city of Cincinnati, kept under authority and by direction of the city council thereof; the same being marked with numbers, books and pages to correspond with the records and papers aforesaid.

This certificate is therefore given by authority of the power vested in me by virtue of the 39th section of the act entitled "An act to provide for the organization of cities and incorporated villages," passed by the general assembly of the State of Ohio, May 3d, 1852.

In testimony whereof, I have hereunto set my name and affixed the
[SEAL.] seal of the city clerk's office, this 20th day of October, in the year eighteen hundred and sixty-two.

GEO. M. CASEY,
City Clerk.

396 *Exhibit C.*

An ordinance, No. 72, to provide for the issue of bonds to the Ohio and Mississippi Railroad Company.

Whereas, by an act of the general assembly of the State of Ohio, passed March 20th, 1850, the city of Cincinnati was authorized, upon a vote of a majority of the qualified voters of said city in its favor, to loan the credit of the city, in any amount not exceeding one million of dollars, to any railroad company or companies which now are or may hereafter be chartered by the general assembly of the State of Ohio, and the termination of which is or shall be by their respective acts of incorporation fixed at or within the said city of Cincinnati, or which shall connect with any main trunk of railroad now terminating or which are intended to terminate at said city: And whereas, at an election held on the 8th day of October, 1850, a majority of the qualified voters of said city did vote for a loan of six hundred thousand dollars to the Ohio and Mississippi Rail-

road Company, which company has been chartered by an act of the general assembly of the State of Ohio, and which Ohio and Mississippi railroad connects with the said city of Cincinnati—(see ordinance, volume 7, page 92;) and whereas, said city council did, by resolution passed September 20th, 1850, agree to loan the said Ohio and Mississippi Railroad Company the bonds of said city in the amount of six hundred thousand dollars, payable thirty years after
397 date, and bearing an interest of six per cent. per annum, payable half-yearly in the city of New York, which loan shall be secured by a mortgage upon said road: Therefore,

Sec. 1. *Be it ordained by the city council of the city of Cincinnati*, That the president of the city council for the time being, and the recorder of the city of Cincinnati for the time being, be and they are hereby authorized and empowered, in the name of and for said city, to carry out and execute the conditions of said resolutions, and to execute, issue and deliver to the directors of said Ohio and Mississippi railroad negotiable bonds for the sum of six hundred thousand dollars of one thousand dollars each, bearing interest at the rate of six per cent. per annum, payable half-yearly in the city of New York, the bonds to be payable thirty years after date; the said bonds to be signed by the president and recorder, and under the seal of the city of Cincinnati; and the coupons for the interest shall be signed by the clerk of said city for the time being, and for the payment of said bonds and the interest the resources, rights and faith, and all the real and personal property of said city, are hereby pledged forever. Done at the council chamber in the city of Cincinnati, this twenty-ninth day of August, in the year eighteen hundred and fifty-one.

Attest:

M. B. CASSILLY, *Pres't.*
W. G. WILLIAMS, *City Clerk.*

398

CITY CLERK'S OFFICE,
City of Cincinnati.

I hereby certify that the foregoing transcripts are correctly copied from the books, papers and journals of the city of Cincinnati, kept under authority and by direction of the city council thereof; the same being marked with numbers, books and pages to correspond with the records and papers aforesaid.

This certificate is therefore given by authority of the power vested in me by virtue of the 39th section of the act entitled "An act to provide for the organization of cities and incorporated villages," passed by the general assembly of the State of Ohio, May 3d, 1852.

In testimony whereof, I have hereunto set my name and affixed the seal of
[SEAL.] the city clerk's office, this 20th day of October, in the year eighteen hundred and sixty- two.

GEORGE M. CASEY,
City Clerk.

399

Exhibit D.

An ordinance, No 203, to amend the ordinance entitled "An ordinance to provide for the issue of bonds to the Ohio and Mississippi Railroad Company," passed August 29th, 1851.

SEC 1. *Be it ordained by the city council of the city of Cincinnati*, That so much of the before recited ordinance as requires the loan of six hundred thousand dollars to said company, to "be secured by a mortgage upon said road," be and the same is hereby repealed: Provided, that before the bonds or any part thereof shall be delivered over to said company, the said company shall mortgage, hypothecate, pledge, and deliver to said city of Cincinnati one million of dollars of the capital stock of said company, with a written authority on the part of said company, under seal, authorizing the city council of said city to sell and dispose of so much stock as will realize the aforesaid sum of six hundred

thousand dollars, said stock to be sold at such times, in such sums, and upon such terms as the city council may determine, and appropriate the proceeds in such manner as said council may direct: Provided further, that said company shall obligate itself by writing under seal, in case of failure to pay interest upon said loan, to transfer to said city of Cincinnati a sufficient amount of the capital stock of said company, with authority to sell the same, as will realize the amount
400 of interest so unpaid.

Done at the council chamber, in the city of Cincinnati, this 29th day of December, in the year eighteen hundred and fifty-one.

Attest: W. B. CASSILLY, *Pres't.*
WM. G. WILLIAMS, *City Clerk.*

401 CITY CLERK'S OFFICE, *City of Cincinnati.*

I hereby certify that the foregoing transcripts are correctly copied from the books pages, and journals of the city of Cincinnati, kept under authority and by direction of the city council thereof; the same being marked with numbers, books, and pages to correspond with the records and papers aforesaid.

This certificate is therefore given by authority of the power vested in me by virtue of the 39th section of the act entitled "An act to provide for the organization of cities and incorporate villages," passed by the general assembly of the State of Ohio, May 3d, 1852.

In testimony whereof, I have hereunto set my name and affixed the
[SEAL.] seal of the city clerk's office this 20th day of October, in the year eighteen hundred and sixty-two.

GEO. M. CASEY, *City Clerk.*

402 *Exhibit E.—Extracts from the minutes.*

"COUNCIL CHAMBER, *Cincinnati, December 29th*, 1851.

"*Resolved*, That the bonds constituting the loan of $600,000 to the Ohio and Mississippi Railroad Company be executed and delivered to the president of the city council of the city of Cincinnati for the time being, to be held by him, and delivered over to said Ohio and Mississippi Railroad Company, upon said company complying with the terms and conditions of the resolutions and ordinances of said city council authorizing said loan.

"Mr. Cassily moved to amend by adding the following; which was agreed to:

"*Resolved*, That before the bonds are delivered to said company, the president for the time being shall have the guarantee of said company that the city, whilst holding said stock or any part thereof, shall be entitled to all such privileges of said stock as are allowed to other stockholders of said company, in proportion to the amount actually loaned and delivered to said com-
403 pany: Provided, however, that all legal holders of any portion of such stock from the city shall be entitled to all the privileges granted to other stockholders.

"The resolutions were then adopted by the following vote: yeas 30, nays 8.

"Mr. Piatt, by leave, offered the following resolution as an addition:

"*Resolved*, That before the bond or bonds for $600,000, or any part thereof, shall be issued or delivered over to said company, the company shall have expended in the actual construction of the road, commencing at Cincinnati, and progressing west, the amount of $140,000, then bonds to the amount of $100,000 of the $600,000 issue, and so on, until the amount of $600,000 is expended in building the road westward from Cincinnati, $100,000 in bonds to be issued for every $140,000 expended by said company on said road or right of way; which was read, and adopted by the following vote: yeas 36, nays 2."—(See minutes, vol. 24, pages 188 and 189.)

404 CITY CLERK'S OFFICE, *City of Cincinnati.*

I hereby certify that the foregoing transcripts are correctly copied from the books, pages, and journals of the city of Cincinnati, kept under authority and by direction of the city council thereof; the same being marked with numbers, books, and pages to correspond with the records and papers aforesaid.

This certificate is therefore given by authority of the power vested in me by virtue of the 39th section of the act entitled "An act to provide for the organization of cities and incorporated villages," passed by the general assembly of the State of Ohio, May 3d, 1852.

In testimony whereof, I have hereunto set my name and affixed the [SEAL.] seal of the city clerk's office this 20th day of October, in the year eighteen hundred and sixty-two.

GEO. M. CASEY, *City Clerk.*

405 *Exhibit F.—Extracts from the minutes*

"COUNCIL CHAMBER, *Cincinnati, April 7th,* 1852.

"Mr. Cassily, by leave, offered the following resolution; which was read and adopted:

"*Resolved,* That the certificate of stock of the Ohio and Mississippi Railroad Company for twenty thousand shares, as security for the payment of the bonds to be loaned said company, be, and the same is, accepted, and shall be deposited with the city treasurer."—(See minutes, vol. 24, page 339.)

The following is a true and correct copy of the certificate of stock in the abovementioned R. R. company and the endorsement thereon:

406 *Copy of certificate of stock.*

No. thirteen.

Incorporated by the States of Indiana and Ohio.—Ohio and Mississippi Railroad Company.

$1,000,000. Shares $20,000.

This certifies that the city of Cincinnati is the owner of twenty thousand shares of the capital stock in the Ohio and Mississippi Railroad Company, tranferable on the books of the company at the Cincinnati office, upon the surrender of this certificate.

Witness the seal of the corporation, and signatures of the president [SEAL.] and secretary, Cincinnati, April 5th, A. D. 1852.

ABNER T. ELLIS, *Pres't.*

H. H. GOODMAN, *Sec'y.*

This stock is issued, mortgaged, hypothecated and pledged to the city of Cincinnati as security for the loan of the bonds of said city for $600,000, (six hundred thousand dollars,) according to and upon the terms and condition specified and referred to in the ordinance and resolutions passed by the city council of the city of Cincinnati, and the resolutions of the directors of said company, and the instrument of writing, under the seal of the company, mortgaging, hypothecating and pledging the same, has been executed, and delivered with this certificate.

407 CITY CLERK'S OFFICE, *City of Cincinnati.*

I hereby certify that the foregoing transcripts are correctly copied from the books, papers, and journals of the city of Cincinnati, kept under authority and

by direction of the city council thereof, the same being marked with numbers, books and pages to correspond with the records and papers aforesaid.

This certificate is therefore given by authority of the power vested in me by virtue of the 39th section of an act entitled "An act to provide for the organization of cities and incorporated villages," passed by the general assembly of the State of Ohio, May 3d, 1852.

In testimony whereof, I have hereunto set my name and affixed the seal of [SEAL.] the city clerk's office, this 20th day of October, in the year eighteen hundred and sixty-two.

GEO. M. CASEY, *City Clerk.*

408 *Exhibit G.*

Bonds for one thousand dollars each, issued to the Ohio and Mississippi Railroad Company, or bearer, by virtue of an act of the general assembly of the State of Ohio, passed March 20th, A. D. 1850, and ordinance of the city of Cincinnati, passed the 29th day of August, A. D. 1851, and December 29th, A. D. 1851, being certificate I, numbered from one to six hundred, inclusive, of the denomination of one thousand dollars each, redeemable on the first day of January, A. D. 1882, with interest at the rate of six per cent. per annum, payable semi-annually at the Bank of America, in the city of New York, signed, dated, and numbered as follows:

100 bonds for $1,000 each, signed by Andrew Griffin, president of the city council, and J. M. Blundell, recorder, and the coupons attached by Wm. G. Williams, city clerk, numbered from one to one hundred, inclusive, dated July 1st, A. D. 1852, delivered to O. M. Mitchell, October 5th, A. D. 1852, being..... $100, 000

100 bonds of the same denomination and signatures as the above, numbered from 101 to 200, inclusive, dated July 1st, A. D. 1852, delivered to O. M. Mitchell, December 7th, A. D. 1852, being..... 100, 000

100 bonds of the same denomination, signatures, and date as the above, delivered to Abner T. Ellis, president of the company, March 2d, A. D. 1853, being numbered respectively from 201 to 300, inclusive, being..... 100, 000

409 100 bonds of the same denomination, signed by James Cooper, president of the city council, and William G. Williams, acting ex-officio as recorder, and the coupons attached by Wm. G. Williams, city clerk, dated June 1st, A. D. 1853, delivered to Abner T. Ellis, president of the company, June 4, 1853, numbered from 301 to 400, inclusive, being..... 100, 000

100 bonds of the same denomination, signatures, and dates as the last aforementioned, numbered from 401 to 500, inclusive, delivered to James C. Hall, president of the company, June 21, 1853, being..... 100, 000

100 bonds of the same denomination and signatures as the last above named, bearing date of July 1st, 1853, numbered from 501 to 600, inclusive, being the full amount of the loan of $600,000, delivered to James C. Hall, president, August 25th, 1853..... 100, 000

I hereby certify the above to be a true copy from the record in the office.

[SEAL.] GEORGE STACKHOUSE,
City Auditor of Cincinnati, O.

Cincinnati, October 20th, 1862.

410 THE UNITED STATES OF AMERICA,
Southern District of Ohio:

I, Joseph H. Geiger, clerk of the circuit court of the United States for the seventh circuit and southern district of Ohio, hereby certify the foregoing to be truly taken and copied from the records, as the same are kept in my office.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said circuit court, this 30th day of December, in the year of our Lord one thousand eight hundred and sixty-two, and in the 87th year of the independence of the United States of America.

JOSEPH H. GEIGER, *Clk.*

Filed December 10, 1863.

No. 103.

THE CITY OF CINCINNATI,
Appellant,

vs.

E. D. MORGAN, ET AL.,
Appellees.

ABSTRACT AND BRIEF
FOR APPELLANT.

HENRY STANBERY,
Counsel for the City.

Supreme Court, United States.

DECEMBER TERM, 1865.

No. 103.

The City of Cincinnati, Appellant, *vs.* E. D. Morgan & Co., Appellees.	In Chancery. Appeal from the Circuit Court for the Southern District of Ohio.

Statement of the Case and Brief for Appellant.

The case in the Court below was upon a bill in Chancery, exhibited January 13, 1860, by the appellees, citizens of New York, as plaintiffs, against The Ohio and Mississippi Railroad Company, The City of Cincinnati, and other defendants.

The plaintiffs below, sued as holders of certain bonds issued by the railroad company, and secured by a mortgage on the road extending from Cincinnati, Ohio, to Vincennes, Indiana, dated December 1, 1853. They claimed that their mortgage was the second lien on the road, being subject to a prior mortgage given to Marshall O. Roberts and others as trustees. They also set forth that two additional mortgages, subsequent in date to their mortgage, had been given by the road company. The trustees of these three mortgages, and the trustees of the mortgage securing the plaintiffs' bonds, were made defendants; and other parties stated as claiming "some lien upon said railroad company and its property," the nature of which was unknown to

the plaintiffs, were also made defendants. Among these was the now appellant, the City of Cincinnati.

The prayer of the bill was for a sale of the road, and distribution of the proceeds "according to the priorities of lien between them" (the plaintiffs) "and all the creditors of said company," to be declared and determined by the Court.

"On the 29th April, 1861, a decree was entered (page 75 of Record), by which as to the City of Cincinnati and some other defendants who had failed to answer, the bill was taken as confessed. By this decree certain priorities are declared in favor of Aspinwall & Co, and of the first mortgage to Roberts trustee, and the second mortgage of the plaintiffs, in the order named; but as to Aspinwall & Co., a further first lien claimed by them is reserved for further consideration. The decree next orders the trustees under the plaintiffs' mortgage to execute the power of sale contained in that mortgage, by selling at public auction, subject to the first mortgage, at not less than $1,000,000, all the property covered by that mortgage. The proceeds of sale are ordered to be distributed, subject to the reserved question as to the Aspinwall claim—to the interest due on the first mortgage bonds, and to the principal and interest of the second mortgage bonds, and the residue to be held subject to further distribution as the Court may thereafter order and decree."

This decree also contained this clause or condition:

"And the Court being advised that there is pending in "the Circuit Court of the United States for the District of "Indiana, a like proceeding in Chancery in which the said "E. D. Morgan and others are plaintiffs, and the Ohio and "Mississippi Railroad Company and others are defendants "upon the same deed of trust set forth in the plain- "tiffs' bill in this case, seeking an enforcement of the said "power and contract of sale for the purpose of paying the "amounts due and in arrear upon said mortgage bonds, "and it being for the interest of all parties that the Courts "in the two jurisdictions should act in harmony, it is or- "dered that no sale be made under the proceedings in this "Court, until a decree substantially like this be entered in

"said case pending in said Court for the district of Indiana, "or until the further order of this Court." (Page 81 of Record.)

No sale has at any time been made under this decree, but at subsequent terms the decree has been opened and modified in several particulars, and amongst others, by setting aside defaults as to defendants against whom the bill was taken as confessed, and allowing such parties to file answers. The City of Cincinnati was one of the defendants so relieved from the decree and allowed to answer.

The answer of the City appears at page 87 of the Record.

It claims a lien in favor of the City, upon the entire road, for a principal sum of $600,000 and interest, prior in date to all the mortgages and other liens set up against the Road.

The question of priority so raised by the City came up for decision in the Court below on the 5th November, 1862 (Rec., p. 166), and the Court decreed that the City had no lien whatever upon any property of the railroad company, except only upon certain stock hypothecated to the city.

From this decree an appeal was prayed by the City, and allowed—it being certified that the other defendants refused to join the City in the appeal.

The only question upon this record is, therefore, upon the decree adjudging that the city has no lien on the road and its appurtenances.

The grounds upon which the City relies for a lien fully appear in the answer of the City, the exhibits filed by the City, and public laws of Ohio and Indiana. They are the following:

The Ohio and Mississippi Railroad, or so much of it as extends from Cincinnati to Vincennes, had its origin in a charter granted by Indiana, Feb. 14, 1848, for the construction of a railway from Lawrenceburgh to Vincennes, within the State of Indiana, with capacity to extend to Cincinnati, Ohio, at the east, and to St. Louis, Missouri, at

the west, when the consent of Ohio and Illinois should be given for such extension.

This charter gave the directors power to increase the capital stock beyond the amount fixed in the act, and gave them "power to borrow money upon the credit of the company, and such other security as may be in possession of of the corporation."

By an amendatory act passed by Indiana, Feb. 13, 1851, power was given to the company to borrow money at any rate of interest, and to issue its bonds therefor, and secure the same by mortgage on the road, income or other property, and to sell, dispose of and negotiate bonds or stocks of the company at any rate of discount, either within or without the State.

By a further amendatory act passed by Indiana on the same day, Feb. 13, 1851, it was enacted "that the several acts of the General Assemblies of the States of Illinois and Ohio, granting to the Ohio and Mississippi Railroad Company the right of way for the purpose of constructing and using a railroad in said separate States, as contemplated in the charter of said company, or otherwise aiding said company, that have now or hereafter may be enacted by either of said States of Illinois and Ohio, shall, upon the acceptance of the same respectively by the board of directors of said company, entered upon the minute book of said board, be taken, considered and adopted as part of the original act of incorporation of said company."

Ohio Legislation.

The general railroad law of Ohio, in force at the date of the original act of Indiana incorporating this company, was the act passed Feb. 11, 1848. This general law contained provisions for the incorporation of companies under its provisions, and other provisions applicable to railroad companies generally theretofore or thereafter to be incorporated. Among these general provisions is the 13th section, conferring "power to borrow money on the credit "of the corporation, not exceeding its authorized capital "stock, at a rate of interest not exceeding seven per cent.

"per annum, and may execute bonds or promissory notes "therefor; and to secure the payment thereof may pledge "the property and income of the company; *provided*, that "the value and security of any liens, mortgages, or the "stock held in or against such company by the State or "the city of Cincinnati, shall not thereby be injured or "otherwise impaired."

Ohio Stat., Vol. 46, *p.* 40.

On the 15th March, 1849, Ohio passed an act "To aid the Ohio and Mississippi Railroad Company." (*Ohio Stat. Vol.* 47, *p.* 172).

This Act, after reciting the incorporation of the company by Indiana, and that to insure the completion of the road from Cincinnati to St. Louis it was necessary to confer on it power to construct its road in Ohio; and that it was deemed expedient to authorize Cincinnati to furnish aid to the construction of the road by subscription to the capital stock, or otherwise, provides in the first section, that the corporate powers granted by Indiana in its charter: "be recognized," and "authorizes the company to 'lay out and construct so much "of said road as lies within the State of Ohio, with the "same powers that are conferred upon railroad companies "by the general law of this State, to obtain the right of "way and materials for the same."

The 2d and 3d sections of the act authorize the City Council of Cincinnati to subscribe an amount not exceeding $1,000,000 to the capital stock of the company, after the qualified voters of the City should by a majority of votes at a special election, decide in favor of the contemplated subscription. The council was authorized, in case of a subscription, to raise the money by the issue of the bonds or otherwise, and to pledge the faith and revenues of the city for security.

This Act contains no provision for any lien or security to the city in respect to the capital stock so to be subscribed.

On the 24th January, 1851, Ohio passed an Act to amend the last mentioned act.

The first section provides: That this company may

allow its stockholders interest on their stock paid in, upon the conditions prescribed in the general act of Ohio, regulating Railroad companies, passed Feb. 11, 1848.

The third section declares, "that the intention of the first "section of the act to which this act is an amendment was "to recognize, confirm and adopt the charter of the said "Ohio and Mississippi Railroad Company as enacted by "the Legislature of the State of Indiana, on the 14th Feb-"ruary, A. D. 1848, and as amended by an act of the Le-"gislature of the same State, approved January 15, A. D. "1849; and the said charter is hereby expressly recog-"nized, confirmed and adopted, as aforesaid, so far as the "same may be applicable to Ohio."

Then follows *a proviso*, that as respects the power of location, and the appropriation of private and public property, the provisions of the Indiana charter shall not extend to Ohio, but for those purposes the company shall have the powers conferred by said general railroad act of Ohio; "and "the City Council of Cincinnati, and other corporations or "persons shall have the same power to contract with said "company in relation to the use of streets and alleys, and "to other subjects, as it has to contract with Railroad com-"panies under said general law regulating railroads."—(*Ohio Stat.*, *Vol.* 49, *p.* 456.)

On the 20th March, 1850, an act was passed by Ohio, which repeals Sections 2 and 3 of the Ohio Act of March 15, 1849, which authorized the City of Cincinnati to subscribe to the capital stock of this company.

The first six sections of this act authorize the issue of $1,000,000 of bonds by the city of Cincinnati, to be lent to railroads terminating in the city, or to be paid in subscriptions to their capital stock, a popular vote being first required, and a vote of the City Council also. The seventh section is in these words:

"That it shall be the duty of the said City Council, and it is hereby authorized to contract with the said companies and with each of them, to secure by mortgages, transfers or hypothecations of stock of said company or companies, or by such other lien or liens, security or securities, real or

personal, as may be mutually agreed upon by the said City Council and the said company or companies, the payment of the amount of the principal of such bonds as they may become due, and for the reimbursement to the said city of Cincinnati the interest upon the same, which shall have been paid by said city; and for the further purpose of securing said city against all loss or losses which the same may suffer, whether by payment of said principal or interest, or any damages arising therefrom, and that the above described liens, mortgages or other securities, shall have priority or precedence of all claims or obligations subsequently contracted by such company or companies, and over other liens, securities or mortgages, which were not duly entered into between said company or companies and other person or party, before the respective issues and loans aforesaid."

(*Ohio Stat.*, *vol.* 48, *p.* 308.)

On September 20, 1850, the City Council of Cincinnati, passed an ordinance to submit to the vote of the citizens, at the next October election, the question whether the City Council should issue and loan bonds of the city to certain railroad companies, in accordance with the Act of March 20, 1850, and among others, $600,000 to the Ohio and Missisippi Railroad Company, the city to "be secured by a mortgage upon such property of the company as the City Council shall require," and that the company "shall make satisfac-" tory provision for the punctual payment of the interest " upon the bonds so loaned to be paid in cash, at the same " time and place as the coupons on said bonds." The city bonds to be payable thirty years after date, bearing interest at 6 per cent., and all bonds, notes and other securities taken by the City Council from the railroad company, to be made payable twenty-seven years after the date of the loan. (Rec., p. 167.)

October 8, 1850, the popular vote was given in favor of the loan to this company. It appears by the ordinance that notice of the vote so to be taken was given in five of the city papers, and was to contain a copy of the Act of March 20, 1850, and of the ordinance also. (Rec., p. 168.)

August 27, 1851, the company passed a resolution, agreeing "to the terms and conditions upon which said City "Council, pursuant to a vote of the people and an act of "the Legislature, agreed to loan its credit to this company, "by issuing its bonds to an amount not exceeding $600,000, "on certain terms and conditions, as set forth in the resolu- "tions and proceedings of the City Council on that subject; "that this company will hold themselves bound to comply "with all said terms and conditions, and will punctually "perform the same;" and that notice would be given to City Council when the progress of the work should entitle the company to an issue of the bonds. A copy of this resolution was sent to the City Council. (Rec., p. 169.)

August 29, 1851, an ordinance was passed by the City Council. It recites the Act of March 20, 1850, and the popular vote in favor of a loan to this company of $600,000, and the ordinance of September 20, 1850, for the loan, "which shall be secured by a mortgage on said road;" and then authorizes the President of the Council and the Recorder of the city to carry out the resolutions, and to execute, issue and deliver to the directors of the company the negotiable bonds of the city to amount of $600,000, in sums of $1,000 for each bond, payable 30 years after date, with interest at 6 per cent. per annum, payable half yearly in New York, and then declares that, for the payment of said bonds and interest, "the resources, rights and faith, "and all the real and personal property of said city are "hereby pledged forever." (Rec., p. 170.)

December 29, 1851, another ordinance was passed by the City Council, to amend the last named ordinance. It contains but one section, and is in these words:

"That so much of the before recited ordinance as requires "the loan of $600,000, to said company, to be secured by a "mortgage on said road be, and the same is hereby repealed, "provided that before the bonds, or any part thereof shall "be delivered over to said company, the said company shall "mortgage, hypothecate, pledge and deliver to said city of "Cincinnati, one million of dollars of the capital stock of said

"company, under seal, authorizing the City Council to seal "and dispose of so much of the stock as will realize the "aforesaid sum of $600,000, said stock to be sold at such "times, in such sums, and upon such terms as the city "council may determine, and appropriate the proceeds in "such manner as said council may direct; provided fur- "ther, that said company shall obligate itself by writing "under seal, in case of failure to pay interest upon said "loan, to transfer to said city of Cincinnati a sufficient "amount of the capital stock of said company, with "authority to sell the same, as will realize the amount of "interest unpaid." (Rec., p. 171.)

Three other resolutions were passed by the city council, of the same date with the foregoing ordinance. The first provides that the bonds be executed and delivered to the president of the council, to be delivered over to the company upon its "complying with the terms and conditions of the resolutions and ordinances of the said city council authorizing said loan."

The second resolution provides that before the delivery of the bonds, the company shall give a guaranty that the city, whilst holding the stock have all the privileges of other stockholders, in proportion to the amount loaned and delivered to the company; and that holders of the stock from the city should have the same privilege. The third resolution fixes a rate of expenditure in the construction of the road, according to which the bonds are to be delivered.

April 5, 1862, a certificate was issued by the railroad company, signed by its president and Secretary, and under its seal, that the city of Cincinnati "is the owner of twenty "thousand shares of the capital stock in the Ohio and "Mississippi Railroad Company, transferable on the books "of the company at the Cincinnati office upon the sur- "render of this certificate."

The endorsement on this certificate is as follows:

"This stock is issued, mortgaged, hypothecated to the

"city of Cincinnati, as security for the loan of the bonds of "said city, for $600,000, (six hundred thousand dollars) ac- "cording to and upon the terms and condition specified "and referred to in the ordinance and resolutions passed "by the City Council of the city of Cincinnati, and the "resolutions of the directors of said company, and the in- "strument of writing, under the seal of the company, "mortgaging, hypothecating and pledging the same, has "been executed and delivered with this certificate." (Rec. 173.)

April 7, 1862.—The City Council resolved "that the certificate of stock of the Ohio and Mississippi Railroad Company for twenty thousand shares, as security for the payment of the bonds to be loaned said company, be and the same is accepted, and shall be deposited with the City Treasurer." (*Rec.* 173.)

It appears by Exhibit G—(*Rec. p.* 174)—that the $600,000 of bonds were issued in six series of $100,000 each, at the following dates, Oct. 5, and Dec. 7, 1852, March 2, June 4, June 21, and Aug. 25, 1863.

The mortgages made by the company bear the following dates:

1. Roberts and others, trustees..... ..May 1, 1852.
2. Mansfield, trustee, plaintiff's mortgage,..... } Dec. 1, 1853.
3. Mortgage,.....April 27, 1855.
4. Construction mortgage,.....March 1, 1856.
5. Income bonds mortgage,.....May 1, 1856.

The total sum due on these five mortgages, with interest to Nov. 1, 1860, was $11,812,742 50. (*Rec. p.* 57.)

In addition to the above there was, at same date, a floating debt, exclusive of the debt due the city, of $613,800. (*Rec. p.* 61.)

The capital stock, exclusive of the 20,000 shares hypothecated to the city, $6,478,854. (*Rec. p.* 26.)

The earnings of the road, (which for the two years prior to the appointment of the receiver, were less than $300,000 per year,) have been consumed almost entirely in necessary expenses. (*Rec. p.* 14.)

Brief.

The decree from which this appeal was taken finds that the City of Cincinnati "has no lien whatever upon the "railroad track and appendages of the defendant, the "Ohio and Mississippi Railroad Company, and has no lien "whatever upon any property of the said Company, other "than the stock held under hypothecation." The effect of this decree is to place the city, except as to the hypothecated stock, in the category of unsecured creditors, without any *lien*, either first or last, upon so much of the property as is covered by mortgages; and without any lien or priority as to so much of the property, real or personal, as happens to be unincumbered by mortgage or other lien. Then as to the hypothecated stock, this decree gives the City no lien or interest through it, upon any property of the Company, other than what belongs to common stockholders—nor indeed does it give that interest until the stock pledged becomes the actual property of the City, or another purchaser, upon a sale under the pledge. The extent of the security, as limited by the decree, is simply the value of 20,000 shares of the capital stock as a vendible commodity.

I claim, in behalf of the City, a lien superior to all other liens, upon the road and other property of the Company—a statutory lien, established by law, to which all others must yield—and that this lien arises upon *the loan* rather than upon the *pledge*—or if not upon the loan independent of the pledge, then upon the loan and the pledge together.

I shall take it as granted, for the purposes of this case,

that the Company exists as an *entire* corporation in virtue of the concurrent legislation of Ohio and Indiana, in so far as its power to make loans and execute securities, is in question. The case below is framed upon that ground. Every law of Ohio enabling the City of Cincinnati to aid this Company, and declaring the terms upon which such aid should be given and received, must be taken as the law of this case. If, indeed, there were a legal necessity for holding that there are two corporations—one existing by law of Indiana, the other by Ohio law—and each existing and limited as a corporate entity, in the State of its creation, yet even as to the Indiana corporation, it comes under the operation of Ohio law by legislative adoption and re-enactment of Ohio law in Indiana. So that whether there is one corporation or two, every Ohio statute which relates to this loan, fully applies.

The first Ohio Act to which I will refer is the General Railroad law of February 11, 1848. The 13th section of this act gives to all railroad companies the power to borrow money and to secure its payment by a pledge of the corporate property, and contains a *proviso* " that the value " and security of any liens, mortgages, or the stock held in " or against such company, by the State or the City of " Cincinnati, shall not thereby be injured or otherwi e im- " paired." It is clear that the legislature intended to guard the interest of the City as carefully as that of the State, and to preserve the value of the stock held *in* or *against* a company, by either the State or the City, from loss by subsequent liens.

Stock held *against* a company in contra-distinction to that held *in* a company, can only mean stock held as a pledge or security, precisely as the stock is held by the City, under the pledge in this case. If this proviso is operative in this case, it must follow that the City stands first, for to postpone it to the subsequent mortgages, not only impairs but destroys the value of the stock as a security.

The first Ohio Act of March 15, 1849, recognizing this Corporation, gives it all the powers for constructing and condemning property for its road, which are given under the general law of 1848. By this first Act authority was given to the City to subscribe $1,000,000 to

the stock of this Company. As no special provision was made in this Act for the protection of the stock so to be subscribed, it is fairly to be presumed that it was considered to be fully protected by the *proviso* of the 13th section.

The next Ohio act is more explicit. It confers various powers upon the corporation in addition to the eminent domain, and adopts it as an Ohio corporation. It places it under the provisions of the general law, not only for the exercise of the eminent domain, but specially provides that the City Council of Cincinnati "shall have the same power "to contract with said company in relation to the use of "streets and alleys, *and to other subjects*, as it has to con- "tract with railroad companies under said general law re- "gulating Railroads." Under that general law, any contract between a Railroad company and the City of Cincinnati, which has resulted in a pledge of capital stock to the city, gives a priority to the pledge by declaring that its value shall not be affected by subsequent incumbrances. Again, if it is held that the 13th Section of this General Law only extends to Ohio corporations, we are authorized for the purposes of this case to treat it as an Ohio corporation, for it is described in the bill a "body corporate legally constituted and organized by and in conformity to the acts of the General Assembly of the State of Ohio." And it is only in that capacity that the Court below could take jurisdiction over it. Besides this, it is characterized as an Ohio corporation by this Court, in the late caseof the Ohio and Mississippi R. R. Co. *vs.* Wheeler.

1 Black.

2.

I claim the lien next under the Ohio Act of March 20, 1850, which repeals those sections of the prior act of March

15, 1849, that authorized a subscription to the capital stock.

This Act does not mention this company nor any other company by name; but applies to all companies whose roads terminate in the city of Cincinnati. It gives authority to the city to furnish aid to such roads, not exceeding in the aggregate $1,000,000, by an issue and loan of its corporate bonds to any of such roads. The 7th Section makes it the duty and authorizes the City Council to secure the payment of the principal and interest of these bonds, by mortgages. transfers or hypothecations of stock of the railroad company, or by such other lien or security, real or personal, as may be agreed on between the Council and the Road company which "lien, mortgages or other securities, are to have priority or precedence of all claims or obligations subsequently contracted by such company or companies; and over other liens, securities or mortgages which were not duly entered into between said company or companies, and other persons or parties, before the respective issues and loans afore said."

The sole purpose of this section was security to the City for the loan or bonds to be issued. A discretion is allowed as to the form of the security. It may be by mortgage, pledge of stock or in any other form of security, real or personal. If the section had stopped there, the form of the security would have controlled its extent; and if mere personal security had been given, there would be no ground to argue that it would bind the Road, or any property of the company not embraced in the very security so given.

But the section does not stop with the clause, giving a choice as to the nature of the security. It proceeds to declare, that for the "further purpose of securing the City" from all loss or damage, the security given shall have priority over all claims, liens, mortgages or securities, subsequently created.

Effect must be given to this part of the section. It must be taken into the account and receive a construction—or rather, to state the point more accurately, *the whole* section must be construed, and every clause be made to operate.

It has been shown that the Council first fixed upon a mortgage of the road as the form of security, and that the

popular vote ratified the loan upon that basis; that the company accepted the loan upon the same basis; and that afterwards the Council dispensed with security by mortgage, and accepted an hypothecation of stock,

This was one of the forms of security named in the 7th section, and it is argued that upon this change a lien upon the stock was substituted for a lien upon the road, and that to make the lien operate on the road also, under the subsequent clause, entirely frustrates the election as to the form of security given in the first clause. It is argued further, that the priority or precedence of lien provided for in the last clause means only a priority or precedence over the securities of a like kind with the one adopted under the first clause. If this construction is tenable it would undoubtedly harmonize the entire section, but clearly it is not tenable.

In the first place, there was no necessity for such a provision, for either form of security taken under the first clause would necessarily have precedence over a subsequent security upon the same subject matter.

In the next place, that construction does not cover all the terms of the last clause, for the priority or precedence is not confined to other liens, whether like or unlike the security taken, but extends as well to all claims or obligations, without lien, subsequently contracted.

Undoubtedly, as to claims without lien, this clause gives to the city precedence over them all, not only as to the stock hypothecated, but as to all other property of the company. The clause certainly does not apply merely to precedence over the thing pledged, for those creditors had only a right to look to so much of the property as was not pledged, or if to property encumbered, subject to the incumbrance.

There are other cogent reasons why this construction cannot be allowed, which will more appropriately appear in the consideration of the construction claimed by the City, which I will now proceed to state.

Let us first consider the subject matter. It is a loan of the credit of the city in the form of bonds, payable as to principal at a distant day, and as to interest semi-annually. No money is loaned. No debt arises in favor of the city

and against the company in the beginning. The parties stand in the relation of principal and surety, and not of debtor and creditor. It is that relation to which *indemnity* against loss applies, for as yet no debt has arisen—only a liability by the city to respond for the company upon a default to be made by the company. This liability may occur at frequently occurring intervals, as the semi-annual interest falls due, and eventually when the principal matures. But whenever it should accrue, and the City be obliged to advance money upon the default of the company to meet an instalment of interest, a debt would arise for which the City would require prompt payment, or the means of enforcing prompt payment. Eventual indemnity, by the slow process of judicial proceedings, would not meet the emergency. It was, therefore, very proper that, in addition to eventual indemnity, provision should also be made in some other form for prompt protection.

Now, consider in this light, the various provisions made in this seventh section.

The Council is in the first place required to take security for the payment of the bonds as they become due, "and for the reimbursement" of interest which may have been paid by the City. It is made the duty of the Council to take such security, but the nature of the security so to be taken is left wholly to the discretion of the Council. It may be by mortgage, hypothecation of stock, or other security, real, or even personal. Surely it could not have been the intention of the Legislature to leave the city with nothing to rely upon but personal security for a liability so large, and extending through a period of thirty years. Nor if the protection of the City was to be limited to the exact scope of the security to be taken, would we look to find so important a matter left wholly to the discretion of the City Council.

But when we consider this clause as more especially intended for prompt protection—as for the reimbursement of interest paid by the city—then it seems reasonable, nay very wise, that full discretion should be left to the counsel to select, though the whole range of securities real or personal, that form which would be most ready and available. One can see that for this purpose, a pledge of promissory

notes, bonds, or stocks, with power to realize by sale, is the most desirable and available form of security, far more available than the mortgage of an entire railroad, even with a power of sale. There is an open market for the one, but it is no easy matter to find a bidder for the other.

Next consider the phrase with which the second clause of the section commences, "And for the further purpose of securing said city against all loss or losses." This language carries the idea of a security additional to that provided for in the first clause. Is it satisfied by a construction which gives no further security? Or which merely declares the legal effect of the security already given? Observe the comprehensiveness of the language: "All loss or losses which the city may suffer, whether by payment of said principal or interest, or any damage arising therefrom." This comprehends all risks which the city may run upon the footing of its loan. It means full indemnity. Then follows in language just as ample and as comprehensive, the provision for such indemnity. This is a priority or precedence in favor of the city, from the date of the loan or issue of bonds, over all other parties and all other forms of security subsequently contracted. It is a priority from the date of the "issues and loans," not from the date of the particular security. The actual *loan* or *issue* of credit is the very thing covered by the idemnity and upon which the indemnity comes into operation. It seems to me this construction is the only one which gives effect to the whole section, and at the same time leads to no repugnancy, and to no superfluous or illusory results.

It would seem that the City Council understood the section according to this construction. They first elected to take security by a mortgage of the road, and to this the company fully assented. Then, so far as appears, upon its own motion, the council required an hypothecation of stock rather than a mortgage. Undoubtedly, as a means to reimburse the city promptly for advances in payment of interest, the substituted security was the best, but as a permanent fund to hold for eventual idemnity against the payment of the principal to fall due after the lapse of thirty years, it was wholly unreliable, and subject to indefinite depreciation by the intervention of subsequent liens.

The City Council exercised a strict statutory authority. They could dispense with nothing required by the statute and exercise no discretion except that conferred by the statute. They could do nothing without the popular vote and do nothing contrary to the popular vote. But the popular vote authorized a loan with security by mortgage of the road, for the terms of the loan set forth in the notice upon which the vote was given, appeared in a copy of the seventh section, and of the resolution of the council stipulating for a mortgage. Now if we so construe this section as to hold that after the popular vote in favor of a loan which gave a lien on the road, that lien was lost by the act of the council in the substitution of another form of security, we take from the people who incur the liability the protection upon which they relied, and allow these public agents to commit a fraud on their constituents.

In favor of good faith on the part of the council, we must presume that they contemplated no such consequences, and did not intend to relinquish this lien by taking the other form of security.

It is a matter, however, of much more consequence to find what was the intention of the legislature, for that must govern, even if the council took the stock with the purpose of destroying the lien on the road. As a legitimate aid in that enquiry I will now call attention to other laws *in pari materia*.

And first to the 13th section of the general railroad law, then in force. I have quoted this section upon the first point made in the brief, as giving the lien or priority to the city upon the footing of the stock hypothecated. I refer to it again to show a public policy, by which the city of Cincinnati was placed on the same footing of the State itself for full protection against loss upon aid furnished to railroad companies. The reason for this peculiar favor to the city is evident. This city, the great centre of population and wealth, to which nearly all the roads of the State tended, and where a great number of them terminated, required such protection from the magnitude of the liabilities it would be expected to incur.

I will next ask attention to another act of the Legislature of Ohio, even more directly to the purpose. This is

an act "to incorporate the Cincinnati Western Railroad Company," passed Feb. 10, 1851. (*O. Stats*, *vol.* 49, *p.* 428.)

It incorporates a railroad to extend from Cincinnati to the western boundary of Ohio, in the direction of Connersville, Indiana. It provides for aid to be furnished by the city to the corporation by a loan of $300,000 of city bonds, upon the same terms in all respects as are provided by the Act of March 20, 1850, in respect to the Ohio and Mississippi Railroad Company.

The 15th section of this act is a literal copy of the 7th section, now under consideration. Then, in the 16th section, it is provided: "That the City Council of the city of "Cincinnati shall not lend her credit or issue her bonds "to this or any other railroad company unless the private "stockholders mortgage a sufficient amount of real estate, "in addition to the road and other effects of said company "or companies, as security for the lending of her credit or "issuing of such bonds by said city."

When the law took effect the loan to the Ohio and Mississippi Company had been authorized by a resolution of the Council and the popular vote, but it was not accepted by the company until six months afterwards. So, too, the first bonds were not issued to this company for more than eighteen months after the passage of this act. The provision as to the security to be given by private stockholders was not exacted. In the present posture of this case, I make no point upon that omission, and I trust no emergency may arise which may drive the city, as a last resort, to a denial of her liability upon these bonds.

The point which I make upon this act is, that it gives us a clear legislative construction of the seventh section of the act under which our loan was made. It stands free from doubt that the Legislature considered the 15th section of this act as giving the city all the corporate security which could be given.

Then, beyond that, and lest it all might not give the full indemnity that was required, the private property of stockholders must also be pledged, "in addition to the road and other effects of the company." This individual security is declared to be cumulative. It carries irresistibly the idea

of provision already made for a lien on all the corporate property—road and everything e'se—and that this is provided for in the 15th section of this act, which is the same thing as saying that it is provided for in the 7th section of the former act.

To put the question in another light, let us suppose a loan made by the city to this Western Railroad Company of $300,000 of bonds, under resolutions of the Council and a popular vote for a security by mortgage, a substitution by hypothecation of stock, and finally a mortgage by private stockholders of their own real property. Could it be held that all the real estate, all the corporate property, except merely the stock pledged, stood clear of any lien, and that the ultimate corporate liability rested alone on the individual property of the stockholders? Could it be held, in other words, that the lien so created by statute, left the corporate property untouched, and fell exclusively upon individual property? Could it be held that all the other corporate property might be granted or taken away from the stockholders, so that not only their stock but their other property might be swept away, and the pledge made by them for one debt be converted into a pledge for all the debts of the company? Next, turning from the stockholders to the creditors—or the loan--could it be held that these careful and extraordinary statutory provisions for security and indemnity, as to a corporate liability, might be so administered as to relieve the corporate property from the charge altogether and divert it to another and subsequent debt? On the contrary, is it not perfectly clear that the meaning of this 7th section of the act of 1850, as declared by the 16th section of the Act of 1851, is, that *all* the corporate property stands as indemnity to the city? The only difference between the two acts is simply this, that, by the act of 1850, the Legislature was satisfied with all the corporate property as a measure of indemnity, whereas, in the act of 1851, they were not satisfied with that alone, but required individual property besides.

3.

I claim, finally, a lien, through the pledge of stock, upon the other corporate property. The decree finds that the city "has no lien whatever upon any property of the com-"pany, other than the stock held under hypothecation."

When the stock was hypothecated all the property of the company was free from any other pledge or incumbrance. Suppose at that time, and before any sale of the stock under the pledge, the company had been forced into liquidation—certainly the city would have stood in priority over stockholders—it would then have a priority not incident to common stock. It may be answered to this, that the lien would then arise upon the debt and in favor of the city as a creditor merely. But take it that other creditors were to be provided for. Would the city be entitled to no priority over them upon the footing of the pledge?

This was the precise condition of things when this decree was pronounced. The stock pledged to the city was unsold; the company was in process of liquidation; all its property was in the hands of a receiver and in process of distribution, and there was a class of general creditors without any pledge of the corporate property. Is the city to stand upon the same level with these creditors, and to have no advantage, by reason of the pledge, in the distribution of the assets which arise as a surplus from other liens, or from property not incumbered. When all the assets are taken, is not the fund taken which is represented by the pledge?

Other considerations might intervene between the city, with nothing but this general pledge, and creditors who have taken a specific lien; but as between the city with this pledge, and creditors with no pledge or lien, it seems to me the city must be preferred. A reversal of the decree upon this ground, which leaves the city only with a preference as to a surplus remaining after the mortgages are satisfied, or over property, if there is any, not included in those mortgages, would have no beneficial results. It is clear that if the mortgages are to be first satisfied, everything will be swept away. I claim, however, under this

point, a reversal on the ground that the city stands now, as it stood when the pledge was made, prior in time and prior in lien upon the corporate property, to all other incumbrances. I claim that under the circumstances of *this pledge*, that is its scope and effect, aside from the further provisions contained in the seventh section giving full indemnity; or that such is the effect of the pledge, *as a pledge*, according to all the provisions of this section which, *quo ad hoc*, give it that effect.

HENRY STANBERY,
Counsel for the City.

Jan., 1866.

103.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF CINCINNATI, Appellant,
vs.
E. D. MORGAN, et. al.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Abstract of the Case, etc., by C. D. COFFIN, Counsel for the Appellees.

C. F. Bradley, 149 Main St., Cin'ti.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF CINCINNATI, Appellant,	APPEAL FROM THE CIRCUIT
vs.	COURT FOR THE SOUTHERN
E. D. MORGAN, et. al.	DISTRICT OF OHIO.

Abstract of the Case, etc., by Counsel for the Appellees.

The Ohio and Mississippi Railroad Company was incorporated by a special act of the Legislature of Indiana on the 14th of February, 1848. It was authorized and invested with power to locate, survey, construct, repair, maintain and operate a railroad between Vincennes, on the Wabash river, and Lawrenceburgh, on the Ohio river, in Indiana, and to extend it eastwardly to the city of Cincinnati, in the State of Ohio. The capitol stock of the Company, is, by the charter, divided into shares of fifty dollars each, and the corporation is authorized to receive subscriptions for stock, or sell any amount of stock, upon such terms and conditions as might be thought advisable, and to borrow money upon the credit of the Company, and such other security as might be in the possession of the corporation.

By an amendment of its charter, it is also authorized to borrow money from time to time, issue its bonds therefor, and to secure the repayment by mortgage of the road, income and other property, and to sell, dispose of, and negotiate such bonds, or the stock of the Company, at such times, at such places and at such rates, as, in the opinion of the President and other officers of the Company, will advance the interest of the Company.

The Company was properly organized in Indiana, under the charter. On the 15th of March, 1849, the Legislature of Ohio passed an act reciting the passage of the act of incorporation by the State of Indiana, and recognizing in express terms, the Company, and the corporate powers granted to it by the Legislature of Indiana, and authorizing the Company "to lay out and construct so much of said road as lies within the State of Ohio, with the same powers that are conferred upon railroad companies by the general law of the State, to obtain the right of way and materials for the same." The second section of this act authorized the City Council of the city of Cincinnati, to subscribe, not exceeding a million of dollars, to the capital stock of this Company. The third section relates to an election in reference to the exercise of the power to subscribe for the stock. Subsequently, in 1857, the Legislature of Ohio passed "an act to amend an act to aid the Ohio and Mississippi Railroad Company," by the third section of which it is declared, that the intention of the before recited act of 1849, was to recognize, confirm and adopt the charter of this Company, as enacted by the Legislature of Indiana, and by this amendment, the said charter is "expressly recognized, confirmed and adopted," and the City Council of Cincinnati and other

corporations and persons, are given "the same power to contract with this Company in relation to the use of streets and to other subjects, as it has to contract with railroad companies under the general law regulating railroads." The Company is also authorized to issue and sell bonds, &c.

The Company was organized under these acts and accepted these amendments to their charter.

On the 20th of March, 1850, the Legislature of Ohio passed "An act to authorize the city of Cincinnati to loan its credit to railroad companies."

The first section authorizes the City Council of the city of Cincinnati, with the previous consent of a majority of the votes polled at an election, &c., to issue negotiable bonds to any amount not exceeding one million of dollars.

The second section provides that the City Council may advance, lend and transfer the said bonds, or any other bonds or stocks then held by the city, in such amounts and numbers as the Council may determine, or may subscribe to and pay for a part of the capital stock of said companies, to any railroad company, &c.

The fifth section provides "that the question shall be submitted to the qualified voters of said city, whether the aforesaid issue and loan, or whether any part or proportion thereof, which the City Council may propose and designate to them, shall be made and contracted, and to this end" the section provides for a vote of the electors of the city for or against such loan.

Section 7 is in these words:

"That it shall be the duty of the said city council, and it is hereby authorized to contract with the said companies, and with each of them to secure by

mortgages, transfers or hypothecation of stock of the said company or companies, or by such other lien or liens, security or securities, real or personal, as may be mutually agreed upon by the said council and the said company or companies, the payment of the amount of the principal of such bonds as they may become due, and for the reimbursement to the said city of Cincinnati, the interest upon the same which shall have been paid by said city; and for the further purpose of securing said city against all loss or losses which the same may suffer, whether by payment of said principal or interest, or any damages arising therefrom, and that the above described liens, mortgages or other securities shall have priority or precedence of all claims or obligations subsequently contracted by such company or companies, and over other liens, securities or mortgages which were not duly entered into between said company or companies and other persons or parties, before the respective issues and loans aforesaid."

The above is an exact copy of the Section 7, including the punctuation as the same is printed in the official copy of the Statutes published by the State.

The city of Cincinnati published a book containing this statute, in which the section is punctuated differently.

"That it shall be the duty of the said city council, and it is hereby authorized to contract with the said companies, and with each of them, to secure by mortgages, transfers, or hypothecations of stock of the said company or companies, or by such other lien or liens, security, or securities, real or personal, as may be mutually agreed upon by the said council and the said company or companies, the payment of the amount of

the principal of such bonds, as they may become due, and for the reimbursement to the said city of Cincinnati of the interest upon the same which shall have been paid by said city, and for the further purpose of securing said city against all loss or losses which the same may suffer, whether by payment of said principal or interest, or any damages arising therefrom, and that the above described liens, mortgages, or other securities, shall have priority or precedence of all claims or obligations subsequently contracted by such company or companies, and over other liens, securities or mortgages, which were not duly entered into between said company or companies, and other persons or parties, before the respective issues and loans aforesaid."

On the 20th of September, 1850, the City Council of Cincinnati passed a preamble and resolutions in these words:

"WHEREAS, At the present day, the means of rapid and easy communication by railway between the chief centers of population and trade in any country and the more remote parts thereof, are becoming not merely advantageous, but essential to its advancement and prosperity; and whereas, experience has shown, that whatever be the case in long settled, populous and wealthy countries, in those in which capital is scarce, the assistance of governments and corporations is necessary, and may be safely afforded to the construction of lines of railroad, and that such assistance is best given by extending to the companies loans of the corporation or government credits, under such proper conditions as will render the improvement advantageous to the city or country, and with such securities as will secure the payment of the loans: therefore be it

Resolved, That the question be submitted to the qualified voters of

the city of Cincinnati at the next autumnal election, to be held on the second Monday of October next, and the Mayor be directed to issue his proclamation for said election, as to whether the City Council shall issue and loan the bonds of the city to the various railroad companies, in the several amounts and under the conditions as hereinafter mentioned, in accordance with an act passed by the General Assembly of the State of Ohio, March 20th, 1850, entitled "An act to authorize the city of Cincinnati to loan its credit to railroad companies," and that notice be given by advertisement of the resolutions and copy of said act, in the five following papers, viz: The *Enquirer*, *Gazette*, *Volksblatt*, *Times* and *Commercial*, for at least ten days previous to said autumnal election. The said loans to be made as follows, viz: $600,000 to the Ohio and Mississippi Railroad Company, the bonds to be issued and loaned at such times and in such amounts as required, when the Directors have expended an equal amount upon its construction, and the whole amount of bonds issued and loaned not to exceed the amount of capital stock subscribed, until the stock so subscribed shall at least amount to the sum of $400,000, subscribed by good and solvent subscribers; and the city shall be secured by a mortgage upon such property of the Company as the City Council shall require, provided the Company shall make satisfactory provision for the punctual payment of the interest upon the bonds so loaned, to be paid in cash at the same time and place as the coupons of said bonds; provided further, that a majority of the Directors shall be citizens of Hamilton county for the first year after said loan or any part thereof shall be made, and so long thereafter as the amount of stock subscribed in Hamilton county, together with the loan of the city, shall exceed the amount subscribed out of the State, and that all moneys raised by subscription of stock, or by the loan of the city, shall be appropriated directly to the construction and equipment of the roads and necessary depots, in the straightest practicable line from the Cincinnati terminus westwardly, excepting the amount necessary for the right of way, incidental and engineering expenses; $150,000 to the Hamilton and Eaton Railroad, $100,000 to the Covington and Lexington Railroad, and to the Belpre and Cincinnati Railroad $150,000, provided the last named railroad connects itself with the Cincinnati and Hillsborough Railroad, at or near the town of Hillsborough. The bonds to be issued and loaned in such amounts as required, when the Directors of said roads shall have expended an equal amount upon their construction, and have given to the City Council good and satisfactory security by mortgage upon said roads for the prompt payment of said loans; pro-

vided they also make satisfactory provision for the payment of the interest on the bonds so loaned, to be paid in cash at the same time and place as the coupons upon said bonds as given by the city; provided further, that all moneys so expended shall be applied to the construction of that part of said road as shall be nearest adjacent to the city; and be it further

Resolved, That all bonds so issued for the above named purposes shall be made payable thirty years after date, bearing an interest of six per cent. per annum; and all bonds, notes and other securities, taken by the City Council from any of the above mentioned companies, be made payable twenty-seven years after the date of each loan.

At the October, 1850, election, the electors voted to loan to the Ohio and Mississippi Company $600,000, "upon the terms and conditions prescribed by the said act of the General Assembly and said resolutions of the City Council." (Record p. p. 88.)

On the 27th of August, 1851, the Ohio and Mississippi Railroad Company passed a resolution notifying the city, that the company had "agreed to the terms and conditions upon which the city, pursuant to the vote of the people, and an act of the Legislature, agreed to loan its credit to this Company, by issuing its bonds to an amount not exceeding $600,000, on certain terms and conditions as set forth in the resolutions and proceedings of the City Council on that subject,"—and the resolution adds, that "due notice will be given to the City Council when the progress of the work (on the road) is such as to entitle them to an issue of bonds." This resolution was received on the 27th of August, 1851, by the City Council. (Record, p. p. 169, 170.)

On the 29th of August, 1851, the City Council passed an ordinance, reciting in a preamble, the Act of the General Assembly; the election by the people, the resolution of the City Council to loan the bonds to the

Company, and declaring, in the preamble, that "the loan shall be secured by a mortgage upon the road," and ordaining that the city officers carry out and execute the conditions of said resolutions, and to execute and deliver the bonds, &c. (Record p. p. 170, 171.)

On the 29th of December, 1851, the City Council passed an ordinance repealing so much of the former ordinance as required the loan to be secured by a mortgage upon the road, and required that before the bonds, or any of them, were delivered to the Company, that the Company "mortgage, hypothecate, pledge and deliver," to the city one million of dollars of the capital stock of the Company, with an authority to sell, &c.

The City Council, also, on the same day, passed three resolutions imposing additional conditions beside those already provided for by the ordinances and resolutions before then passed. (Record p. p. 171, 172.)

On the 5th of April, 1852, the Company issued the stock, and executed in due form the documents required by the ordinances and resolutions of the city, and, on the 7th of April, 1852, they were delivered to and accepted by the city. (Record p. p. 173, 89.)

The Railroad Company executed and delivered to the grantees therein named, deeds of trust of said road and its appendages, in substantially the same form as that set forth in the record, p. p. 6, 7, 8 and 9, to secure a large number of bonds which deeds and the money secured thereby, may be briefly stated as follows:

(*Record p. p.* 55, 56 *and* 57, *deposition of Trevor.*)

1. Deed of trust, May 24, 1852, recorded 10th of June, 1852, - - - - - - - $2,050,000.00

(*Record p. p.* 77, 89.)

2. Deed of trust, December 1, 1853, recorded December 1, 1853, - - - - - - - - $ 258,000.00

(*Record p. p.* 9, 55, 56.)

3. Deed of trust, April 27, 1855, - - - - 4,000.00
4. Deed of trust, March, 1856, - - - - 4,242,000.00
5. Deed of trust, May 1, 1856, - - - - 3,320,000.00

The city delivered a part of the bonds on 5th October, 1852, and concluded the delivery on 25th August, 1853. (Record p.p. 174, 89.)

On the 13th January, 1860, E. D. Morgan & Co., holders of some of the bonds, secured by the second deed of trust, filed this bill, making the company, the city of Cincinnati, the Trustees in the several deeds of trust, and many of the holders of the bonds and others, defendants.

The city of Cincinnati in her answer to this bill, claims that the loan by her, of her bonds of $600,000, to the company, is the first lien upon the railroad, &c. The Trustees named in the several deeds of trust, and the bondholders, deny that the city has any lien whatever upon the road, or upon any property of the company, other than the stock specifically pledged to the city as security for the loan.

The Circuit Court, upon hearing, decreed that the city had no lien upon the road, &c., from which decree the city appealed.

I have, in this brief abstract of the case, set out two copies of the 7th section of the statute of Ohio, of 20th of March, 1850, presenting that section as it appears in two official publications, one by the State and the other by the city of Cincinnati. I do not know

that these copies differ substantially, except in the punctuation, and as to that, I beg leave to refer to the opinion of this Court, expressed by Mr. Justice Baldwin, in *Ewing vs. Bund*, 11. *Peters*, 54: "Punctuation is a most fallable standard by which to interpret a writing; it may be resorted to when all other means fail, but the Court will take the instrument by its four corners, in order to understand its true meaning: if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it."

Upon the facts of the case, I confess my inability to understand how, and upon what principle, the city of Cincinnati can maintain a lien upon the Ohio and Mississippi Railroad and its appendages, for this loan of her bonds.

Liens, as known to us, either in law or in equity, exist by common law, by maritime law, by usage, by contract, under which I include all those which expressly or impliedly constitute trusts, and by statute.

I am aware, that in the civil law there were various classes of privilege creditors, and that the preference which one had before the other, depended, not upon priority of time, but upon the quality of their privileges. Of all these privileged creditors none are known to our law, so far as real estate is affected, unless regulated by statute, with the exception of what, in our jurisprudence, is known as an equitable lien by the vendor for the purchase money. This lien, or any one assimilated to it, cannot be applied to this case, for the railroad company purchased nothing from the city but her negotiable bonds, and they are now held by *bona fide* purchasers for value. And if the railroad company had, in fact, purchased a part of the railroad itself from the

city, she could not now assert a vendor's lien upon the road, because she waived her lien and took other security for her debt. The city of Cincinnati advanced her bonds to the railroad company, which bonds were sold by the company and the proceeds applied, with other moneys, towards the construction of the road. If there were no other facts in the case and no other persons interested in the question, and another rule of the civil law prevailed in Ohio, by which those who lend money for a purchase of an estate, or to be laid out on the improvement of an estate, under some circumstances, are deemed privileged creditors, there might be some room for an argument to sustain the lien of the city upon the road of the company, but there are other facts which materially affect the question; there are innocent *bona fide* purchasers of other valid liens, upon the road without notice of this claim of the city, and no such privileged creditors are known to our law. Our courts recognize the vendor's lien for land sold, as between the vendor and vendee, and his assignee with notice, provided there are no circumstances which show that the vendor did not rely upon his equitable lien, but advancing money to enable a purchaser to buy land, or to improve land, though the money he actually used for that purpose, gives no lien whatever upon the land or the improvements. *Stansell vs. Roberts*, 13 *Ohio*, 148, 156.

There can be no pretext of a lien by common or maritime law, or by usage. The only lien that can exist, it seems to me, therefore, must arise out of a contract between the parties, or by force of some statute.

1. By contract. The statute of the 20th of March, 1850, gave the city express power to make the loan.

It was made under that statute, and it is unnecessary to enquire whether the city had or had not the power independent of that statute.

By the resolutions of the 20th of September, 1850, of the City Council, and the resolution of the railroad company of the 27th of August, 1851, (the electors of the city having consented,) the city had agreed to make the loan, and the railroad company had agreed to accept it, upon the terms and conditions set forth in the resolutions of the City Council. Every material thing, as to the loan, was agreed upon by the parties, save only, the designation of the property, by which the railroad company was to secure to the city the repayment of the loan and interest.

That was not agreed upon. How it was to be secured, and by what property, was left to the future agreement of the parties. It was, however, to be secured by an agreement, and the parties were to mutually agree upon the security.

It is stated in the answer of the city, that by this resolution of the City Council of the 20th of September, 1850, the loan of $600,000 was to be secured by a mortgage of the road. In this the city is mistaken. The resolution of the 20th of September, submitting the question to the electors, whether the City Council should issue and loan its bond to this company, proides that "the city shall be secured by a mortgage upon such property of the company as the City Council shall require." The loans to the other railroads named in the resolution, were required to be secured by "good satisfactory security by mortgage upon said roads." This will clearly appear by looking to the several provisions in regard to this and the other enu-

merated companies. As to this company, the first proviso after naming the sum, is, that the bonds are to be issued and loaned at such times and in such amounts as required, when the Directors have expended an equal amount upon its construction. Precisely the same proviso is made as to the other companies. The second proviso as to this company, is, that the whole amount of bonds issued and loaned shall not exceed the amount of capital stock subscribed, until the stock so subscribed shall at least amount to $400,000, subscribed by good and solvent subscribers; then comes the sentence, "and the city shall be secured by a mortgage upon such property of the company as the City Council shall require," and to this is added a proviso, "the company shall make satisfactory provision for the punctual payment of the interest upon the bonds so loaned, to be paid in cash, at the same time and place as the coupons of said bonds." Precisely the same proviso is added to the clause of the resolution requiring the other named railroad companies to give a mortgage upon said roads. The next proviso as to this company, is, that a majority of the Directors shall be citizens of Hamilton county, for a specified time, and then is added, "and that all moneys raised by subscription of stock, or by the loan of the city, shall be appropriated directly to the construction and equipment of the road and necessary depots in the straightest practicable line from the Cincinnati terminus westwardly, excepting the amount necessary for the right of way, incidental and engineering expenses." A corresponding proviso is added in the grant of the money to the other companies by which it is provided that "all moneys so expended shall be applied to the construction of that

part of said road as shall be nearest adjacent to the city." (Record p. p. 168.)

There can be no doubt but that the city intended to secure their loans to the Hamilton and Eaton road and to the other roads named in that connection, by a mortgage upon the roads respectively, but as to the Ohio and Mississippi, the Council reserved the right to designate what property of the company they would select as security, and did not intend to embarrass their future action, in this particular, by requiring a mortgage upon the road.

It will be noticed that these resolutions were passed in September, and not until the August following, did the city take any action in the matter. Then, by an ordinance of the 29th of August, 1851, the city designated the security which she then preferred to be "a mortgage upon the road." The act of the Legislature provided, that the city and the company should *mutually agree* upon the security, and it seems to me, that it is clear, that while the city might require, in the first instance, a mortgage upon the road, the contract was not completed until the company had either assented to that requirement, or to some other one proposed, on the part of the city, or offered some other security, to which the city assented. The city, though a municipal corporation, was acting as a person with power to contract with the company for the security, and the railroad company, though a private corporation, was also acting as a person with power to contract with the city to give the security. There could not be an agreement, until the minds of the parties had met, and either or both, had the right and the power to make offers and negotiate, upon this point, precisely as two natural persons,

and there was no contract until the security had been "mutually agreed upon" by the city and the company.

Matters stood in this position, without any agreement between the parties, until the December following. The negotiations between the city and the company during this time do not appear in the record, but the objections which the company might reasonably have to a mortgage of her road for $600,000 will readily suggest themselves. The road to St. Louis would be at least 340 miles long; to Vincennes about 200, and to encumber this road and its appendages, not yet built, with such a mortgage, would render it exceedingly difficult, if not impossible, to raise the necessary funds to build and equip the road. All second mortgages, though they may be in fact ample security for the money named in them, are nevertheless looked upon and held in the market as second class securities, and not only the company, but the city might reasonably conclude, that it was better for the company and for the city, that the company should not encumber its road with such a mortgage. The money advanced upon such terms would not in fact aid the company, but would embarrass it in its future negotiations for loans. Although the sum of six hundred thousand dollars is a considerable sum of money for many purposes, yet for "the construction and equipment of the road and necessary depots," it was a very inconsiderable sum. These considerations, no doubt, induced the city, when she offered the loan to this company, to leave open the question of security. But whatever may have been the reasons which prevented the agreement upon a mortgage of the road and induced the city to offer to take other security, the city did on the 29th of December, 1851, designate and require

other security. By the ordinance passed on that day, she withdrew her demand for a mortgage upon the road, and offered to accept other security. This latter offer was accepted by the railroad company, on the 5th of April, 1852, and the security, agreed upon, given. Then, and not until then, was the "contract," which the Legislature had authorized the city to make, made. The parties had now "mutually agreed," in the language of the statute, upon the security for the loan; the company had executed her part of the contract, and it only remained for the city to execute it on her part, to make it an executed contract. The city, subsequently, delivered the bonds, in the sums and at the times stated in the record, and "the contract" for the loan and the security was thus executed by both parties.

Express power is given by the statute, to the city to make the loan and "*to contract*" for the security. The city had the right to require this loan to be secured by a mortgage, or by a transfer or hypothecation of stock, or by such other lien or liens, security or securities, real or personal, as, in the exercise of her discretion she might deem best.

The securities named, "mortgages, transfers or hypothecation of stock of the said company or companies," are well known to the law, and the rights of the parties to such contracts are well defined and settled, and the words which immediately follow, "or by such other lien or liens, security or securities, real or personal," refer to contracts of a like nature. (2, *Story Reports*, 155, 156.)

Not being limited in her discretion as to the shape and form of the security, in the exercise of her power, it was quite natural for her to negotiate with and make

offers to the other party; and whether these offers were made by a committee, or by other agents, or by resolutions, or ordinances, they were mere offers until accepted. She had most ample power to contract, and this power was not expended until the parties had mutually agreed upon all the terms, and not until the contract thus made, had been fully executed. The authority given to contract, necessarily gave the power to execute the contract. Having made an express contract upon the subject, full, clear and explicit in its terms, no contract can be raised by implication.

By this contract, the city of Cincinnati obtained, and now holds, the stock transferred by the railroad company, as security for this loan, and her rights and privileges, as a holder of that stock, are not greater than the rights and privileges of other stockholders; they are precisely the same. During the negotiations for security, she did ask for a mortgage upon the road, but before any agreement was made, she withdrew her proposition for a lien upon the road. When she consummated the contract she did not ask, she did not seek, or desire, a lien upon the road. She obtained a lien upon 20,000 shares of the stock of the company, and upon nothing else. She did not contract for any other lien or security, real or personal, and she, like every other party to a contract, must stand by her contract. She has no legal, equitable or even moral right to claim beyond her contract.

She did not contract with the company as to the "priority or precedence" of her lien over that of "other persons or parties," because no other persons or parties had any claim upon this stock. It passed to her unincumbered; and the city's lien upon it has priority and

precedence of all others. The city, so long as she holds this stock is a stockholder in the company, and the circumstances show, that, that was the only relation intended by the parties between the city and the company. How then can it be maintained that the city has any lien upon the Ohio and Mississippi Railroad? The corporation owns the road; the stockholder does not own it; it belongs exclusively to the corporation, and no party can obtain a conveyance of it, in any other way than that prescribed by law for the conveyance of property by its owner.

2. By statute. The statutes under the provisions of which the city claim a lien upon the property of the company, are: 1st, the Act of the General Assembly of Ohio passed *20th of March*, 1850, and hereinbefore set forth; 2d, the *13th section* of the act of *February* 11, 1848, regulating railroad companies; and 3d, a private act, incorporating the Cincinnati Western Railroad Company, passed *February* 10, 1851.

1. As to the Act of 20th of March, 1850. In the course of the discussions which have been had, in and out of Court, formal and informal, upon this statute of the 20th of March, 1850, various constructions have been given to the seventh section. Some of my learned brethren, have expressed the opinion, that the statute gave the city power to contract with the several railroad companies, for any kind of security upon which the city and the company might agree, and that the 7th section should be read as though written, that the City Council is authorized to contract, not only to secure the payment of the amount of the principal of such bonds, as they may become due, but also authorized to contract for the reimbursement to the city of the interest upon the

bonds which shall have been paid by the city, and for the further purpose of securing the city againt all loss or losses which the same may suffer, whether by payment of said principal or interest, or any damages arising therefrom, the City Council is authorized to contract with said companies, that the above described liens, mortgages, &c., shall have priority, &c., &c.

This construction makes the lien and the question of its priority depend upon the contract between the city and the railroad company, and in this case, as the city contracted for the stock and it only, the city has no other security for her debt.

Others, have held, that the first part of the 7th section, gave the power to the City Council, on behalf of the city, to contract with the several companies, to secure the repayment of principal and interest of the loans by a security to be agreed upon by the respective parties, and that by the last clause of the section the law itself, independent of the contract, attached a lien, or charge upon the property which the parties had agreed upon as the security for the repayment of the loan, principal and interest.

If this construction is the correct construction of the statute, it does not aid the city in this suit. She asserts a lien upon the road, while this construction merely gives a lien upon the stock. It seems to me, however, that this latter construction cannot be supported upon correct principle. The statute undoubtedly gives the power to the City Council to contract with the companies for the security, and proceds to express, very clearly, the nature of the security which the City Council is authorized to contract for; indeed, it is not merely authorized, but it is made the duty of the City Council

("*it shall be the duty of the said City Council,*") to contract with the companies, and with each of them, to secure by mortgages, transfers or hypothecation of stocks of the said company or companies, the payment of the principal and interest of the bonds. These securities thus named, show clearly the nature of the security which it is the duty of the City Council to require. In a mortgage and a pledge there passes to the grantee or pledgee a property in the thing mortgaged or pledged. In the one, the legal title, in the other, it may be the legal title, or it may be a qualified property which passes, but they are both transfers of property, and the mortgagee or pledgee, has more than a lien upon the thing mortgaged or pledged; he has a vested property in the subject of the mortgage or pledge. Now, as I have already remarked, the words which follow the specific securities which it is made the duty of the City Council to require—"or by such other lien or liens, security or securities, *real* or *personal*," &c., clearly show, that the other liens, &c., must be understood as confined to securities of a like nature with those designated. Turning now to the latter clause of the section, which it is supposed by this construction attaches a lien or a charge upon the property agreed upon as the security, it will be found that it refers to the above (before) described liens, mortgages or other securities; that it does not in any manner enact that the amount of the loan shall be a charge upon any property whatever, not even that mutually agreed upon. It leaves the character of the lien, if I may so express it, to the contract itself. It merely declares that the liens, mortgages or other securities contracted for, or mutually agreed upon, shall have priority over, or precedence of

and the law of that contract

all *claims and obligations subsequently* contracted, by such company or companies, and priority over other liens, securities or mortgages, *which were not duly entered* into between said company or companies, and other persons or parties, *before the respective issues and loans aforesaid.* It will be noticed that no where in this law is anything said of the property to be conveyed or transferred as security, excepting the stocks of the said company or companies. No where in the statute is there the least allusion to the road itself: but authority is expressly given to secure the debt by real property, or by personal property. The naming of personal property in the disjunctive, and the designation of the stocks of the companies, clearly show that authority is given to agree upon personal property alone as the security: thus expressly, if I may so say, excluding the road itself and all real property. Seeking to know, then, what is the meaning of the statute as to the priorities, we must remember that it is not, that the debt itself shall have priority over other claims, and over other liens, but that the liens contracted for,—the liens mutually agreed upon, are to have priority, and as the contract has designated particular and specific property, this must necessarily, it seems to me, be confined to the identical property mortgaged or pledged, and to none other.

The statute authorizes the city to loan its credit to various railroad companies, and to contract with these companies to secure the loans by any of the ways named, or any other liens, or securities, which may be mutually agreed upon by the city and the companies. The loans and securities were not to be made jointly, but the city is authorized to contract with them sever-

ally. Each company is to make a separate and distinct contract with the city to secure the loan it receives. With one company the city may require a mortgage upon the road, as she did in the resolution of the 20th of September, 1850, of the Hamilton and Eaton road; with another she had authority to agree, for a mortgage upon real estate, independent of the road; with another for the transfer or hypothecation of stock, as in the case with the Ohio and Mississippi Company. In giving a construction to that part of the statute declaring the priority of the liens secured to the city by her contracts with those companies over other liens held by other persons, the fact that this part of the statute is general in its terms and must have been intended to apply to different companies and to differing circumstances, must be kept in view, and it is not necessary that every part, or all the words, of the statute should have meaning and effect as to the acts of the parties in the particular case. This part of the statute is in the nature of a fundamental law, intended to apply to such cases as might properly come within its purview, and then to the extent only they might be embraced. Upon no proper construction can it be held to apply to a case where the city concluded the contract, by taking stock of the company as the security for the loan, so as to give to the stock held by the city a priority over the stock held by other stockholders, where by the charter of the company there are no priorities among stockholders. It can only apply to cases where the security taken, whatever it may be, is of the character or kind where priorities among holders can properly exist according to the established rules of law or equity.

The lien of the city is obtained by the contract with

the Ohio and Mississippi Railroad Company, and not by the statute. The lien by the contract is inconsistent with a general lien by statute, and shows that no general lien by statute was intended. This contract between the parties is to receive the same legal construction as a like contract of other persons. That part of the statute declaring the priorities of the liens, has direct reference to the exercise of the power to contract for the lien and to the property contracted for as the security, and it must, in my judgment, be held to apply solely to cases and to property, where the parties have contracted for securities upon property, which upon settled principles admit of priorities among holders, and that this part of the statute is merely declaratory of the law as it before then existed. Statutes are often declaratory of the common law. (*Dwarris on St.* 605.) Indeed, statutes are to be construed in reference to the common law, for it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. The best interpretation of a statute is to construe it as near the rule and reason of the common law as may be, and by the course which *that* observes in other cases.

1 *Kent*, 464.
Dwarris, 564.

If I understand the claim of the city, as asserted in her answer, it is a claim for a lien upon the road; a charge upon the road for these $600,000 and interest. How, or in what manner this charge was created, or how and when it attached, I confess I do not know. It was not created by contract, it did not therefore attach by agreement. If it exists, it must be by the force and effect of some statute, and we have that of the 20th of March, 1850, now under consideration.

I submit with great confidence, that it cannot be successfully claimed in this case, that the Legislature intended, by this local law, to change the general law of the State, as it then existed, upon the subject of priorities among well known securities, and apply a different rule to the city of Cincinnati, in its dealings with these various and numerous railroad companies, to that which is, by law, applied to other contracting parties with these companies. Nor can it be, that the Legislature intended, by this statute, to change the law of Ohio, so as to introduce a new principle, by which the city of Cincinnati was to have, at all events, and under all circumstances, a lien upon all the property of these companies for these loans. Neither of these constructions of this statute, can, in my judgment, be sustained upon any established or settled rule of construction. They are at war with all the other provisions of our statutes upon the same subject, and I take the true rule, in the expounding of statutes to be, that statutes relating to one subject, though passed at different times, are to be held, if possible, as governed by one spirit and policy, and intended to be consistent and harmonious in their several parts and provisions. If the Legislature had intended such radical changes in the law, it would have so expressed itself as to have placed the matter beyond all doubt. It is always to be presumed, that when the Legislature intends such radical changes, it will express that intention in clear and explicit terms. *Dwarris on St.*, 593.

If the Legislature of Ohio, had intended, when it authorized the city of Cincinnati to loan its credit to the amount of a million of dollars to aid the railroad companies who were then striving to bring business and

trade to the city, to change the law upon the subject of priorities among holders of well known securities, and apply a totally different rule to the securities of the city to that which applies to others, or to secure this loan, at all hazards, upon all the property of these companies, or upon their roads, or any other particular property, it could, and no doubt, it would have expressed that intention clearly and distinctly and in few words.

It seems to me, also, that a construction of this statute, by which the statute itself is to be held as giving a lien upon the property of the company, without reference to the contract, would lead to absurdities of which it is not possible any Legislature could be guilty. In such a construction, I ask, a lien upon what property? for none is named or designated in the statute. If I am answered, upon all the property, (and the statute makes no discrimination,) then this absurdity follows, that the Legislature expressly authorizes the city and the company to agree upon some particular property as the security for the loan, to separate that property from all the other property of the company, and by acts, or instruments of writing well known to the law, and the force and effect of the words of which are well settled, specifically mortgage, or pledge that property so as to give a specific lien upon it, and then to give to the city by the statute a lien, for the amount of the loan, and, not merely a preference over other liens subsequently acquired on the same specific property, but a lien on all the property of the company of all kinds. Such a construction would not only render worse than useless that part of the statute authorizing the city and the company to agree upon the security, but would make it operate as a fraud

upon the public, for by the city and the company agreeing upon a security, men of ordinary intelligence would reasonably conclude that having separated property as the security, and there being no act of the parties designating other property as security, that the residue of the company property was unincumbered by that debt. Indeed, it seems to me, to give such effect to a statute purely local, would be doing great injustice to all other parties dealing with these companies.

2. By virtue of the provisions of the 13*th section* of the act of *February* 11, 1848. This act is a general law of Ohio, and is entitled "An act regulating railroad companies." It is to be found in the general laws of Ohio, *vol.* 46, *p.* 40. It is also to be found in 1. *Swan and Critchfield St.*, *p.* 271, *note.*

The first section of this act designates to what companies it applies. By that section, it is enacted:

"SECTION 1. That whenever any number of persons, not less than five, shall be named as corporators in any act of the General Assembly, and authorized to construct a railroad, they and their associates, successors and assignees, by the name and style provided in said act, shall thereafter be deemed a body corporate with succession with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, and the same to alter, break and renew at pleasure, and do all needful acts to carry into effect the object for which it was created; and such company shall possess all the powers, and be subject to all the rules and restrictions provided by this act, except so far as may be modified by the special act incorporating the same."

The 13*th section*, of this act, is in these words:

"SECTION 13. Such company shall have power to borrow money on the credit of the corporation, not exceeding its author-

ized capital stock, at a rate of interest not exceeding seven per cent. per annum, and may execute bonds or promissory notes therefor, and to secure the payment thereof may pledge the property and income of such company; provided, that the value and security of any liens, mortgage, or the stock held in or against such company by the State, or the city of Cincinnati, shall not thereby be injured or otherwise impaired."

This 13th section has no application to the Ohio and Mississippi Railroad Company. This company derives none of its powers from that section, and it cannot be affected by the proviso appended to and made a part of the section.

A proviso, is a clause containing a condition applicable to another clause in the same statute limiting the provisions of the other clause. It has no force and effect unless the previous clause is a part of, and has relation to the subject matter of the proviso, and herein a proviso differs from an exception. An exception *exempts*, absolutely, from the operation of an enactment; a proviso restricts the operation partially or conditionally.

The Ohio and Mississippi Railroad Company was incorporated by the Legislature of Indiana. The act of Ohio of 15th of March, 1849, recites, the passage of the act, incorporating the company, to construct a railroad to Cincinnati, and the organization of the company, and then adds:

"AND WHEREAS, To insure the completion of said railroad, it is necessary to confer upon said company power to construct the road from the line of the State of Indiana to the city of Cincinnati; and whereas, it is deemed expedient to authorize the city of Cincinnati to aid by a subscription to the capital stock of said company, or otherwise in the construction of said railroad. Therefore,

SECTION 1. *Be it enacted by the General Assembly of the State*

of Ohio, That the corporate powers granted to said company by the act of Indiana incorporating the same, be recognized; and the said company is hereby authorized to lay out and construct so much of said road as lies within the State of Ohio, with the same powers that are conferred upon railroad companies by the general law of this State, to obtain the right of way and materials for the same. 47, *Ohio Local St.*, 172.

This statute of Ohio incorporates this company, with all the powers given to the company by the charter of Indiana. In no other way can "the corporate powers granted by the act of Indiana incorporating the same," be recognized by the Legislature of Ohio, and this statute authorizes this company "to lay out and construct so much of said road as lies within the State of Ohio." The power to lay out and construct so much of a railroad from a given point in Indiana to the city of Cincinnati, in Ohio, must be held to be authority to maintain and operate the road when it is constructed. The only power, which the company obtains from the provisions of the general law of the State relates to the right of way and materials for the construction of the road. This power is granted to the company, not as a corporation organized under, or deriving its powers from the act of February 11, 1848, but as a corporation created by the act itself, (of the 15th of March, 1849,) and specially clothed with this power by the act. In obtaining the right of way and materials it acts as a corporation of Ohio, precisely as it would have done had this act set forth so much of the general law of the State as relates to that subject. All the other powers granted to the company, and all the restrictions and duties imposed upon the company, are to be found in the words of the Indiana statute. Whether by this

legislating, the legal being created by the law of Ohio, is the same legal being created by the law of Indiana, or whether they are separate corporations, deriving their legal existence from the laws of the respective States, is immaterial. A corporation may legally exist in Indiana, and another in Ohio, having the same name, composed of and representing the same natural persons and clothed with the same capacities and powers, and intended to accomplish the same object.

If there were any doubt that the Legislature of Ohio intended to and did incorporate this company, as I have herein claimed, that doubt is removed by the act of 24th of January, 1851. I prefer setting out this statute in full, instead of relying upon my abstract of it in the statement of the case in this brief. The act is as follows:

AN ACT

TO AMEND AN ACT TO AID THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That the Ohio and Mississippi Railroad Company may allow to *its stockholders,* until its road shall be completed and put into operation, such rate of interest on the *capital stock* paid in, as the Directors may determine, payable in *stock* or cash, upon the conditions prescribed in the act entitled an act regulating Railroad Companies, passed February 11, 1848.

SEC. 2. That said Railroad corporation is authorized to make the width of the track, or guage of its road, the same width as that adopted by the Railroad Companies of the State of Indiana.

SEC. 3. It is hereby declared that the intention of the first section of the act to which this act is an amendment, was to recognize, confirm, and adopt the charter of the said Ohio and Mississippi Railroad Company, as enacted by the Legislature of

the State of Indiana, on the fourteenth day of February, A. D., 1848, and as amended by an act of the Legislature of the same State, approved January 15th, A. D., 1849, and the said charter is hereby expressly recognized, confirmed and adopted, as aforesaid, so far as the same may be applicable to the State of Ohio; *Provided*, That so far as the said charter may be considered to confer upon *said corporation*, powers to locate or change the location of said Railroad, to cross or divert streams and roads, or obtain the right of way and appropriate property for said Railroad, the same shall not be deemed, within this act, applicable to this State; but for these several purposes, *the said corporation* shall be governed by, and shall have the *same powers* which are conferred upon the Railroad Companies, by the general law of the State regulating Railroad Companies, passed February 11, 1848; and the City Council of Cincinnati, and other corporations or persons, shall have the same power to contract with said Company in relation to the use of streets and alleys, and to other subjects, as it has to contract with Railroad Companies under said general law regulating Railroads.

SEC. 4. That the *Board of Directors* of the Ohio and Mississippi Railroad Company are authorized to sell or cause to be sold, or disposed of, *the bonds* of said Company issued or to be issued for loans to said Company, at any time and place within or without the State of Ohio, and on such terms and conditions and for such price or prices, whether above or below par, as to them shall seem best; and all such bonds shall be valid and binding upon said Company, for the full amount and for all the terms therein expressed, although sold out of the State, or for less than the par amount thereof, and said Company shall have power to establish offices for the tranfer of *their stock and bonds* in the city of New York.

SEC. 5. That *the said corporation* be, and hereby is, authorized and empowered to purchase and hold to them and their successors forever, real and personal estate, to any amount necessary for constructing, maintaining, and repairing said Railroad, and the works connected therewith; and may receive, hold, and take all voluntary grants and donations of land and real estate which

shall be made to aid the objects of said corporation, and to receive real estate choses in action, or other property in *payment for subscriptions for stock*, and whenever in either of the ways aforesaid, said corporation shall become possessed of, and own any lands or real estate which it may be unnecessary for them to retain for the purpose aforesaid, it shall be lawful for them to lease and convey the same by lease or deed.

SEC. 6. That this act shall be in force from and after its passsage.

JOHN F. MORSE,
Speaker of the House of Representatives.
CHARLES C. CONVERSE,
Speaker of the Senate.

January 24, 1851. (49 *Ohio Local St.*, 456.)

From this act it is clear that this company was specially incorporated by the Legislature of Ohio. No matter what may be said, as to so much of this act as declares what was the intention of the act of 15th of March, 1849, as to its being merely a declaratory law, and only the construction of a law before then passed, the statute itself, *in presenti* enacts, in the 3d section, that the charter of the Ohio and Mississippi Railroad Company, as enacted by the Legislature of the State of Indiana, on the 14th of February, 1848, and as amended by an act of the Legislature of the same State, is thereby expressly recognized, confirmed and adopted as aforesaid. This enactment makes the provisions of the Indiana statutes part of the law of Ohio, as fully as if they had been repeated *verbatim* in the statute itself. *Lessee of Stall vs. Macalister.* 9, *Ohio*, 22.

This act speaks of this company as a corporation:—of the powers granted:—of its Board of Directors:—of subscriptions for stock:—of its stockholders:—of its bonds:

—of its purchase of lands, and conveying the same by deed. It thus plainly appears that it was the intention of the Legislature in the enactment of these statutes concerning the association of persons described in the statutes of Indiana, to establish them in Ohio under a corporate organization, to accomplish a valuable and important purpose. *Ohio & Miss. R. R. Co. vs. Wheeler*, 1, *Black*, 286, 297.

And it is equally plain, it appears, to me, that the Legislature did not intend, that this corporation should be governed by the provisions of the act, of 11th of February, 1848.

The first section, of the act of 24th of January, 1851, refers to a special privilege granted to stockholders in companies coming within the provisions of the act of 11th of February, 1848, and authorizes *this company* to grant the same *to their stockholders.*

The second section, authorizes a *different guage of the road*, than that of companies under the act of 1848.

The third section, having given this corporation the same rights, privileges and powers, which were conferred on the corporation in Indiana by the statutes of Indiana, adds a proviso: that the power conferred upon the corporation by the Indiana charter to locate or change the location, obtain the right of way, &c., shall not be deemed, within this act, applicable to this State; but for *these several purposes*, the corporation shall be governed by and shall have the same powers which are conferred by the act of 1848. The limiting to this company the powers contained in the act of 1848, to these special purposes, is withdrawing from this company all the other powers and privileges granted in that act, and at the same time, relieves this company, from all "the rules and restrictions" imposed by that act.

The charter, as granted by Indiana, gives the corporation express power "to borrow money, upon the credit of the company and such other security as may be in the possession of the corporation, to promote the objects of the act, *on such terms, as to interest and payment*, as shall be deemed most for the interest of the company." And it is authorized "to buy and sell, hold and convey real estate, make contracts," &c., &c.

By the fourth section of the act of Ohio of 1851, the corporation is authorized to sell its bonds issued, or to be issued, for loans to the company, at any time and place, and on *such terms and conditions, and* for such prices, whether above *or below par*, as it may deem best.

Without further examination of the powers granted to this corporation by these special acts, can it be successfully maintained, that the 13th section of the act of 11th of February, 1848, has any application whatever, to this company? The power and privileges granted by that section have been otherwise expressly granted to this company. Instead of being limited in the amount it may borrow, to an amount not exceeding its capital stock, as are the companies under the act of 1848, this company is only limited in amount by the discretion of its managers; instead of being limited to 7 per cent. per annum as interest, this company may pay whatever sum per cent., as interest, may be deemed advisable; and it may do more, it may sell its bonds for loans of money as much below par as it may deem best. And the power to pledge and mortgage the property of the company is granted by all the statutes.

It seems to me, that the principle I have already adverted to, is conclusive against the right of the Ohio and Mississippi Company to exercise and enjoy any of

the power and privileges granted in the act of 1848, merely by force of that statute. Where there is an express reference to a particular law, or an agreement, which law or agreement authorizes the exercise of many great powers and privileges, and there is authority given in this reference to a third party to use a particular power therein named for a specific purpose, it must be held that no other power is granted to the party than that specially named, and he can only exercise it for the specific purpose designated. If any further examination of the question were necessary, a reference to the first section of the act of 1848, must settle the question. That section limits that act to companies where the Legislature shall name, in a special act, any number of persons as corporators, not less than five, and the proviso, to that section, clearly excludes this company, because the powers granted and the restrictions imposed by that act are inconsistent with the powers and privileges granted to this company by the special acts incorporating the same.

If this company does not derive its power to borrow money and pledge its property from the 13th section of the act of 1848, then the proviso appended to and made a part of that section has no application to this company and can have no influence in the decision of this case.

I think it unnecessary to discuss, to any great extent, the true meaning of the 13th section of this act of 1848, because, as I have already endeavored to show, it has no application to this company, or to the stock held by the city in this company, but the Court will pardon me, if I say a few words upon the subject. I need not repeat what I have said in reference to the word "liens," in connection with the word, "mortgages."

The liens referred to in this proviso, are liens by contract, and as the city has no liens by contract upon this road, that part of the proviso has no application to this company.

A word or two, as to "the stock held in or against such company," by the city, and I shall dismiss this point.

I do not believe that if a company organized under the act of 1848 had obtained a loan from the city under a statute like that of the 20th of March, 1850, with power to agree upon the hypothecation of its stock as security, and the contract was executed by the hypothecation of the common stock of the company, that the city would have any other right against the company, or its property, or its mortgage creditors, than that of any other stockholder. To give her any greater privileges, or the stock any larger power, would make the character of the stock depend upon the holder and not upon the stock itself. This would not only be a new feature in any general marketable (and these stocks are so held) security, but would make it very difficult, if not practically impossible to administer the affairs of the company.

I know that in modern days, in the refinements of corporate associations, there has been introduced into some companies a class of stock, known as preferred stock, its character depending upon the contract of association and the organic law of the company, and it is quite possible, that under a proper organization and with a contract of association authorizing it to be done, that as to stock subscribed by the city, or separated to her from the common stock, there might be given peculiar privileges. In such a case, the stock itself would

have its peculiar privileges stamped upon it, and it would continue to have that character no matter into whose hands it passed.

But to convert a few shares of the common stock of a company, in which there is not and cannot be a discrimination among its stockholders into stock of a new character, changing entirely its relations to the company, its property, and the residue of the stockholders, and endowing it with the extraordinary rights claimed for the stock held by the city in this company, merely because the city holds it for the time being, is a proposition so new, so startling in its character, and so utterly at variance with the knowledge I have upon the subject, that I cannot give it my assent. When first entered on the books of the company it is common stock; a year afterwards, it is transferred, by its owner, to the city, and it is instantly invested with extraordinary powers; in a month or two, or perchance a year, transferred by the city to its original owner, or to some other person, and it is then shorn of its greatness and its power, and so poor, that there are none to do it reverence; the next month held again by the city, and *presto*, it holds the Exchequer of the company in the hollow of its hands.

If such wonderful changes can be wrought in the value and power of stocks, there are many stockholders, in many companies, who will cheerfully pay large premiums to the city to become holders of their stock; and the city offices under the general power to manage the affairs of the city, have the power to deal fairly and legitimately, and prudently in the public securities of the State.

The proviso appended to and made a part of the 13th section of the act of 1848, can only apply, it seems to

me, to stock originally subscribed by the city, or to stock set apart from the common stock of the company. The construction claimed for it by my learned friend, with all due respect to his great learning and profound judgment, I must be permitted to say, would lead to absurd consequences; and in such an event the words of a statute are to be controlled by the common law, or they may be disregarded entirely; (*Dwarris*, 594,) indeed, in many cases, where the meaning of a statute is obscure or doubtful, the consequences of a particular exposition must be considered in its construction. (*Dwarris*, 593.) And it is not uncommon for courts to reject clauses in a statute of which they are unable to ascertain the true meaning.

To give a construction to this statute by which the mortgages upon the road are to be disregarded, and a part of the common stock of the company advanced from its true position, to a security over these conveyances to the destruction of the rights of the mortgagees, is, in my judgment, making it a statute, impairing the obligation of the contracts between the company and the mortgagees. It would in effect, certainly, render them worthless.

If, however, the proviso is held to apply to all or to any stock held by the city, in any and in all companies, it gives no lien upon the road, or upon any of the property of the company.

How can the stock be injured or impaired by borrowing money and securing its payment by a pledge of the property of the company? Expressly granting the power, implies that there may be a necessity to borrow and to secure its payment by a pledge of property, and it is also a declaration of the propriety of the measure,

if the necessity exists. Who is to judge of that necessity? The Directors; and in nearly all the railroad companies in the country the stock of the companies would have been of little value, unless the Directors had exercised this power and obtained money, by loan, to aid in the construction and equipment of the roads. Where a company borrows money upon the security named, in good faith, and it is expended upon the road, how, I again ask, can the stock of the company be thereby injured or impaired? It may be injured by the fraudulent contracting and securing such debts, and if the pledgee concurred in the fraud I can understand why he is postponed, or defeated altogether in his lien, but if the money is loaned in good faith, though improvidently expended, I cannot see how the security of the lender can be impeached, or impaired.

3. The next statute under which the city asserts a lien upon the Ohio and Mississippi Railroad, is, "*An act to incorporate the Cincinnati Western Railroad Company*," passed February 10, 1851, and published among the local laws of Ohio, *vol.* 49, *p.* 428.

The 9th section of this act authorizes the City Council to issue bonds to an amount not exceeding $300,000, payable at any time or times at the will of the City Council, beyond the period of ten years and within thirty years from their issue. Section 10, authorizes the city to lend the bonds to that railroad company. Section thirteen, provides, that the question whether the said issue and loan shall be made and contracted, shall be first submitted to the electors, &c.

The 15th section is a transcript of the 7th section, of the act of March 20th, 1865, as published by the city of Cincinnati, and expressly authorizes the City Council

"to contract with the company to secure by mortgages, transfers or hypothecation of stock of the said company, by such other lien or liens, security or securities, real or personal, as may be mutually agreed upon by the said Council and the said company," the payment of the bonds, &c.

The 16*th section* provides, "that the City Council of the city of Cincinnati shall not lend her credit or issue her bonds to this or any other railroad company, unless the private stockholders mortgage a sufficient amount of real estate, in addition to the road and other effects of said company or companies, as security for the lending of her credit or issuing of such bonds by said city.

And if the Directors of said railroad company shall determine to pay the bonds or the evidences of debt issued by said city, or any portion of them, prior to the time the same may become due, then the said railroad company may issue their own negotiable bonds or notes, at not exceeding eight per centum per annum, interest, for a like amount, and to secure the payment thereof, and the accruing interest, may mortgage the income of said road, and it may by its proper officers or agents, as shall be prescribed by the bye-laws of said company, dispose of and negotiate said bonds at such time and at such places, either within or without of this State, at such rates, and payable at such places as shall, in the opinion of said company, be expedient, and the said company is hereby authorized to confer upon the holders of any bonds issued as aforesaid, the right to convert the same into the stock of the said company; and furthermore, that the City Council of the city of Cincinnati shall not lend the bonds or credit of said city to any railroad company, to any larger

amount than has already been paid in and expended in the construction of the road by private stockholders, at the time of advancing or lending such bonds or credit."

This act is a private act. It has no reference to the Ohio and Mississippi Railroad Company. Certainly, none by express words, and I think, none by necessary implication. It is not only local, but it is personal: it comes precisely within the language of the Vice Chancellor, *in Dawson vs. Paver*, 5. *Hare*, 434,—"the act, in this case, is a local, personal, and in that sense, a private act;—local, as being confined to a particular place; and personal, as being expressed to be for the benefit of individuals named in it, and not for the benefit of all her majesty's subjects, however, all may incidentally be benefited by that which improves this particular district." Such acts do not bind strangers; they are regarded and construed as contracts between the public and the company.

1, *Mylne & Keen*, 154, 162.
2, *Crompton, M. & R.* 141.
3, *Blackford*, 98.
4, *Peters*, 167.

Again: the Act does not authorize the construction, which, I understand, will be claimed for it. It does not require a lien upon the road, of even the Cincinnati Western Railroad Company for the bonds issued to that Company. Section 15, by express words, authorizes the city and the company to agree upon the security, real or personal, and it seems to me, that upon no sound rule of construction can it be held that the Legislature intended, by the very next section in the same statute, to take away the power so clearly given. "And," is not always to be taken conjunctively. It is, sometimes, in

the fair and rational construction of a statute to be read as if it were "or," and taken disjunctively. (*Dwarris*, 682.) Substituting *or* for *and*, where it occurs between the words, "in addition to the road and other effects of said Company," in the first sentence of the 16th section, so that it will read, "in addition to the road or other effects of the Company," and the two sections are perfectly intelligible and harmonious. This limitation of the power of the city to loan her bonds to the Company incorporated by this act, binds this Company, but the words, "or any other Company," inserted in that section, must be held inoperative. To hold that these words, crowded into this section of a strictly private act, repeals or limits the express grant of power in the public act of 20th March, 1850, to the city to loan her bonds to the Companies designated in that act, would give a very favorable consideration to repeals by implication, while the law is well settled, that repeals by implication are not favored. Two or more statutes are to stand and have effect if possible.

1, *Ohio St.* 20, 6, *do.* 316, 8, *do.* 264.

Cotemporaneous construction of persons appointed to execute a statute is entitled to great respect, and is of vast importance in deciding questions arising under it. (3, *Ohio*, 355, 12, *Wheaton*, 206.) The City Council, the City Solicitor and other officers, acted upon the statute of 1850, as vesting power in the city to agree with the Ohio and Mississippi Railroad Company upon the security for the loan, and that the act of 10th February, 1851, did not repeal, modify or limit that power.

But suppose these words are held to limit that power, what then? How has the city a lien upon the road?

The lien required by these statutes, are liens by contracts, and not by operation of the statutes themselves, and as the Company never contracted, either expressly or impliedly, to give a lien, the city can have no lien.

There can be no pretence of an express contract, and there are no circumstances from which a contract can be implied, because every act done by the Company, in the whole transaction, had direct reference to and was a part of the express contract.

I have not been able to see any thing in the statutes of the State which, independent of contract, gives the city a lien, or makes this debt due to the city, a charge upon the property of the Railroad Company. If the provisions of any of the statutes giving that effect to the debt of the city have escaped my notice, or I have not rightly apprehended the force and effect of the provisions I have noticed, and the Court should be of the opinion, that this debt of the city is a lien, or charge upon the road of the Company by force of the statute; then I submit, that the debt can only be a lien or charge upon that part of the road within the State of Ohio. The statutes of Ohio can have no such effect in Indiana.

In the Circuit Court, the counsel for the city insisted that the security taken by the city from the Ohio and Mississippi Company, covered all the property of the Company; — that the pledge of the 20,000 shares of stock was a pledge of all the property of the Company.

It is embarrassing to attempt a reply to a proposition not clearly understood, and this embarrassment is increased in this case, because I have not been able to hear or read the argument, on the part of the city, by which her counsel intends to sustain this claim.

The stock, which the city agreed to receive, was to be

"one million of dollars of the capital stock of said Company," and the stock issued to the city, is described, in the certificate, as a part of the capital stock of the corporation. It was in fact a part of the capital stock of the Company. It was agreed by the parties, that the city, while holding this stock, should be entitled to all the privileges allowed to other stockholders. No other rights were given to the city than those belonging to other shareholders; none other could be given, nor could the city acquire from the Company any other rights or equities. The Company had no power to, nor did she agree to discriminate between holders of her stock. The city obtained twenty thousand shares of the stock of this Company, and this gave her, (assuming that she was the owner,) a right to partake, according to her proportion of the whole number of shares of the stock, in the surplus profit obtained from the use of the capital stock of the Company until the dissolution, and then to her proper shares of the assets of the Company. The charter authorized the Company so to dispose of this stock. The act of 20th March, 1850, authorized the city to accept from this Company a transfer of the stock of the Company, and this, if any other authority than the charter were necessary, is also authority for the Company to transfer the stock. This statute does not authorize the Company to discriminate between the stock held by the city and that held by other shareholders, and as I have already urged, I think it is clear, that the statute itself makes no discrimination.

There are cases where the distinction between the property of the corporation and the rights of the stockholders in the corporation is not carefully observed.

The distinction, however, is well understood and settled. The corporation may be seized of acres of real property: deal largely in real estate; possess goods and money to any amount, but no individual stockholder has any direct interest in the *corpus* of the property itself. The property of the corporation belongs to it, and to it only. The interest of the stockholder is a share of the net produce of all the property of the corporation, brought into one fund. The stockholders are as distinct from the corporation as any other persons who are not stockholders. The money obtained from the stockholders belongs to the corporation itself; the stock to the shareholders.

Bligh vs. Brent, 2, *Younge & C.*, 295.
Bradley vs. Haldsworth, 3, *M. & W.* 422.
State vs. Franklin Bank, 10, *Ohio*, 90, 97.
Johns vs. Johns, 1, *Ohio St.*, 351.
Bridge Co. vs. Sawyer, 6, *Exchange*, 507.

Railroad shares are not an interest in lands. Whether they are goods within the statutes of frauds or not, the cases do not agree. They resemble choses in action; have been held to be choses in action. They are in truth, merely, the evidence of a right to have a share of the profits of the business of the corporation.

(3, *Kerman*, 627.)

How then can the city, by a mere pledge of these shares of the stock of this company, obtain a lien upon the railroad?

There are no circumstances connected in any way, with the contract between the city and the Company, which changes or can change the rights of the parties, and of other creditors of the Company. I know of

nothing which affects or can be made to affect the stock held by the city, by which the city occupies or can be made to occupy, any different position from that of other stockholders, and I cannot see how the city, by or through this stock, has any lien upon any property of the Company, other than the stock itself.

If all the stockholders in this corporation had individually united in an agreement with the city to give her a lien upon the property of the corporation for this loan, it would not have given her the least interest in, or charge upon the property itself; and how one stockholder can, by, or through his stock, work out a transfer of, or a lien, or charge upon the property of the corporation is, with the poor lights I have upon the subject, more than I would be willing to advise.

The several deeds of trust were executed and delivered, at the time hereinbefore stated, and they were duly recorded. They are transfers of the railroad then constructed and to be constructed, of the lands of the company, of the furniture of the road, and of all the tolls and income thereof. The bonds secured by these deeds are outstanding in the hands of *bona fide* holders. The grantees, by these deeds, acquired a vested interest in the property, in trust for the bondholders, and I submit that these bonds must all be first satisfied out of the proceeds of the sale of the property, before anything can be paid to any other creditor of the company.

There is nothing in the statutes of Ohio, nothing in the contract of the parties, which in my judgment gives the city a lien upon the road; and I can find nothing, which secures to the city a priority in payment over the other creditors of the company, in the distribution of the fund arising from a sale of the road, by virtue of a decree entered in a case like this.

No. 103.

CITY OF CINCINNATI,

vs.

E. D. MORGAN AND OTHERS.

Additional Brief of C. D. COFFIN, Counsel for Appellees, in Reply to Mr. Stanbery's Brief

SCRIVER & SWING, Prs, 470 13th Street.

CITY OF CINCINNATI, }
vs. } No. 103.
MORGAN AND OTHERS. }

Additional Brief by C. D. Coffin, for Appellees.

Since printing my brief, I have been furnished with the brief of Mr. Stanbery, counsel for the City of Cincinnati, and I desire to note a few words in reply.

1. As to the *decree* below. Mr. Stanbery says it gives no lien or interest in the stock, until the stock becomes the actual property of the city. What effect is to be given to the decree depends upon the title which the city acquired by the papers and the acts of the parties.

If the city is a naked pledgee, then Mr. S. may be right, but if the city is a mortgagee, then it is owner. As a mere pledgee it has a qualified property in the thing pledged. A mortgagee of personal property has the legal title. The city is more than mortgagee, it is owner. By the ordinance of the 29th December, 1851, the Railroad Company were to "mortgage, hypothecate, pledge, and deliver to the city, $1,000,000 of the capital stock of said company, with a written authority on the part of said company, under seal authorizing the city council to sell and dispose of so much of the stock *as will realize the aforesaid sum of* $600,000, said stock to be sold *at such times*, in such sums, and upon such terms as the city council may determine, and appropriate the proceeds in such manner as said council may decide;" the ordinance then provides for more stock to sell, to repay interest which the city may have to pay on her bonds. (Record, p. p 171, 2.)

It is clear to my mind that the city intended to have, and the company intended to give her, the power to sell the stock *at any time*, and use the proceeds of the sale as she pleased, being of course, accountable to the company in the final adjustment of the loan for the stock, or its proceeds. This is made more manifest, if possible, by the resolutions

passed on the same day (29th December, 1851) *See Record, p. p.* 172.

2. In commenting upon the statute of Ohio, of March 15, 1849, Mr. Stanbery, says this statute gives it (the O. & M. R. R. Co.) all the powers for constructing and condemning property for its road, which are given under the general law of 1848."

The power to construct the road is expressly given to the company by the act itself. The power of eminent domain is the same power conferred upon railroad companies by the general law of Ohio. The O. &. M. R. R. Co. is not to be governed by the act of 1848, but it is invested with the *same powers*

3. Mr. Stanbery says that the city first fixed upon a mortgage of the road and "that the popular vote ratified the loan upon that basis; that the company accepted the loan upon the same basis." This is a mistake. The popular vote had no reference to a mortgage of the road. The city council did not propose to the company a mortgage of the road until ten months after the popular vote. The vote was for the loan to be secured upon such property of the company as the city might require, and had no more relation to a mortgage of the road than it had to a mortgage of stock. The company never agreed to a mortgage of the road: the company never accepted the loan upon that basis.

4. In commentating upon the 7th section of the act of the 20th March, 1850, Mr. Stanbery says, "Surely it could not have been the intention of the Legislature to leave the city with nothing to rely upon but personal security for a liability so large and extending through a period of thirty years." I think the intention to do that very thing, if the city thought it best, is clearly expressed. The statute makes it the duty of the city council to contract with the company to secure, *by real, or personal* security, as may be mutually agreed upon, the payment of the *amount* of the *principal* of such bonds, as they may become due, AND for the reimbursement of the interest.

Mr. Stanbery then argues that the first clause of the section applies to the interest and not to the principal, and he

bases his argument upon the idea, that the second clause, as he terms it, of the section, "carries the idea of a security additional to that provided for in the first clause,"—"it means full indemnity." Now what "loss or losses" could the city suffer besides the payment of the principal and interest of her bonds? I know of none. The bonds to be issued were to be "*negotiable bonds*," to be payable at the shortest period, ten years after date. They were to be a marketable security and were to be put upon the market. If by the first clause of this 7th section the city and the company were authorized to agree upon the security for the payment of the amount of the principal of the bonds as they may become due, and for the reimbursement to the city of the interest upon the same which shall have been paid by the city, what other risks were there against which indemnity was to be provided?

The statute does not contemplate that the company shall pay the holder of the bonds, but that it shall pay the city the amount of the principal of the bonds: a sum of money equal to the bonds as they mature, and if the company reimbursed the interest, and paid the city the amount of the principal, would not the city be fully indemnified? The city and the company agreed upon a security for these purposes, and the city thereby did obtain full indemnity, or rather, what she took as, and believed to be, full indemnity.

It is said by Mr. Stanbery, that the priority provided for in this section, is not from the date of the security, but from the "issues and loans." The language of the statute is,—"before the respective issues and loans aforesaid," evidently referring to the several companies to whom loans were to be made, and of course, whatever date the instrument by which the lien was created might base the question of priority, as between lien holders, on the same property, would depend upon the actual date or time of issue and loan, and not the date of the instrument; and the same rule would apply to several issues to the same company. In a controversy between the city and a third party as to priority of lien on the same property, the times of the several issues might become important.

5. Mr. Stanbery further says that "the city council understood this section according to his construction," and then he adds that the city required and the company "fully assented" to a mortgage of the road. The company, as I have before said, never assented to mortgage the road. And the city council never understood the 7th section, as Mr. Stanbery construes it, as is most clearly manifest by their resolutions, ordinances and actions. The resolution of the 20th September, 1850, certainly contemplates security *other than the road*, for the *principal of the bonds*. The ordinance of the 29th December, 1851, is full and clear upon this subject. It provides for the stock: that with the stock there shall be a written authority to the city, from the company, authorizing the city, "*to sell and dispose* of so much stock *as will realize* the aforesaid sum of $600,000," when and where the city pleases and to appropriate the proceeds as she pleases. The ordinance then provides security for the interest, as distinct from the principal, of the bonds. The resolutions of that date, also show, that the city looked to the stock, *and to it only*, as the security for the *principal and the interest of the bonds*. The instrument mortgaging the stock, and containing the power to sell, &c., was executed and delivered to the city, with the stock.—*Record*, *p. p.* 89 *and* 173.

By this ordinance, by these resolutions, and by the action of the city council in the premises, it is shown that all the security which the statute required them to take, as they then construed the law, was the stock with the guarantees which accompanied it. The resolution of the city council of April 7th, 1852, expressly accepts the stock *as security for the payment of the bonds*.—*Record*, *p. p.* 173.

And this construction by the city council, should have great influence. But says Mr. Stanbery, this security, is "wholly unreliable and subject to indefinite depreciation &c." Well, admit it, what then? The city and the company were to contract, and if either, or both erred in judgment, in the absence of fraud, how can that affect the case? It is not a question of expediency, but of power. The city might *then* have thought it more reliable than a mortgage upon a road

not yet built. The resolution of the company of 27th August, 1851, shows that the right of way for the road had not been obtained, nor had contracts been made to construct the road.—*See Record, p p.* 169, 170.

6. Mr. Stanbery, in reference to the act of 10th February, 1851, chartering the "Cincinnati Western Railroad Company," says: "The point is, that this act gives a Legislative construction to the 7th section of the act of 1850, and that construction is, that the section gives the city "all the corporate security, which could be given."

I beg leave to say, that this Legislative construction of the seventh section of the act of 20th of March, 1850, is not what my learned friend supposes it is, but is, in my judgment, exactly what I have claimed the true construction to be. The statute of 10th February, 1851, is a private statute authorizing a loan to the company incorporated by the act, and it provides that the city and that company may agree upon the security for the *principal and for the interest*, but in *addition* to the security agreed upon, as full indemnity, from the company, the stockholders are to mortgage real estate. This statute shows that the security agreed upon by the city and the company, by the fifteenth section of that act, (and by the seventh section of our act,) was for the principal of the bonds.

7. As to the stock. Mr. Stanbery says that when the stock was pledged all the property of the company was free, and then, if the company had been forced into liquidation, the city would have stood in priority over stockholders,—it would then have had a priority not incident to common stock. This I deny. The city never had priority over other stockholders; it never had any other right than that common to all the stockholders, and if the company, after obtaining the $600,000 from the city, had been unable to build the road and had been dissolved and a distribution of the assetts had taken place, the city would have had to suffer like other shareholders, and would only have been entitled to her proper share.

C. D. COFFIN,
for the appellees.

U. S. SUPREME COURT.

THE CITY OF CINCINNATI,
vs.
E. D. MORGAN, *et. al.*

Appeal from the Circuit Court for the Southern District of Ohio.

ARGUMENT FOR APPELLEES.

THOS. G. MITCHELL.

Mallory, Stanage & Co., Prs. Cin'ti.

SUPREME COURT

Of the United States.

CITY OF CINCINNATI *vs.* E. D. MORGAN, *et. al.* } *Appeal from the U. S. Circuit Court for the Southern District of Ohio.*

BRIEF FOR APPELLEES.

THE facts of this case, so far as they relate to the claim of the City of Cincinnati, which is the only claim to be passed upon by the Court, on this appeal, may be very briefly stated.

By "an act regulating railroad companies," passed by the General Assembly of the State of Ohio, February 11, 1848, *General Laws, vol.* 46, *p.* 40, it is provided, "that whenever any number of *persons*, not less than five, *shall be named as corporators*, in any act of the General Assembly, and authorised to construct a railroad," they shall be deemed a body corporate; and "shall possess all the powers, and be subject to all the rules and restrictions provided by this act, *except so far as may be modified by the special act incorporating the same.*" *Section* 1. And among the powers, conferred by this act, upon the corporations referred to, is a power to borrow money, and to issue bonds, and to secure payment thereof by a pledge of the property and income of such a company; "provided that the value

and security of any liens, mortgage, or the stock, held in or against such company, by the State or the City of Cincinnati, shall not thereby be injured or otherwise impaired." *Section* 13.

By an act of the General Assembly of the State of Indiana, passed February 14, 1848, *Local Laws for* 1848, *p.* 619, certain persons therein named were constituted a body corporate, by the name of The Ohio and Mississippi Railroad Company; with power to borrow money upon the credit of the Company and other security; and were authorised to construct a railroad from Vincennes to Lawrenceburgh; and to extend the same eastwardly to Cincinnati, and westwardly to St. Louis, whenever the right of way should be granted by the States of Ohio and Illinois. *Sections* 1, 6, *and* 13. The General Assembly of the State of Ohio, March 15, 1849, passed an act, *Local Laws*, *vol.* 47, *p.* 172; reciting, in its preamble, the act of incorporation by the State of Indiana, just referred to, and the organization of the Company, and that it was necessary to confer upon said Company power to construct the road from the line of the State of Indiana to the City of Cincinnati;" and providing "that the corporate powers, granted to said Company, by the act of Indiana incorporating the same be recognized;" and authorizing the Company, "to lay out and construct so much of said road, as lies within the State of Ohio, *with the same powers*, that are conferred upon railroad companies, by the general law of this State, *to obtain the right of way and materials for the same*." *Section* 1. And by a subsequent act of the General Assembly of the State of Ohio, passed January 24, 1851, *Local Laws*, *vol.* 49, *p* 456, it is "declared, that the intention of the first section of the act to which this act is an amendment, (the section just referred to), was to recognize, confirm and adopt the charter of the said Ohio and Mississippi Railroad Company, as enacted by the Legislature of the State of Indiana," and the said charter is thereby "expressly recognized, confirmed and adopted as aforesaid, so far as the same may be appli-

cable to the State of Ohio; provided that so far as the said charter may be considered to confer upon said corporation power to locate or change the location of said railroad, to cross and divert streams and roads, or obtain the right of way and appropriate property for said railroad, the same shall not be deemed, within this act, applicable to this State; but *for these several purposes*, the said corporation shall be governed by, and shall have the same powers which are conferred upon, railroad companies by the general law of the State regulating railroad companies, passed February 11, 1848.

March 20, 1850, the General Assembly of the State of Ohio, passed an act, to be found in the Local Laws, Vol. 48, p. 308, empowering the City of Cincinnati, by a vote of the majority of the City Council, with the previous consent of a majority of the votes polled at a regular election, to issue its bonds to any amount, not exceeding one million of dollars; and lend them to one or more railroad companies, of a class designated, or transfer them in payment of subscriptions to the capital stock, of such companies; and pledge the faith of the city, for the payment of the bonds and interest. By the 5th section of this act, it is provided, "that before the issuing of the bonds, hereinbefore mentioned under this act, the question shall be submitted to the qualified voters of said city, whether the aforesaid issue and loan, or whether any part or proportion thereof, which the City Council may propose and designate to them, shall be made and contracted." And by the 7th section it is farther enacted "that it shall be the duty of the said City Council, and it is hereby authorized, to contract with the said companies, and with each of them, to secure by mortgage, transfers or hypothecations of stocks of the said company or companies, or by such other lien or liens, security or securities, real or personal, as may be mutually agreed upon by the said council and the said company or companies, the payment of the amount of the principal of such bonds, as they may become due, and for the reimbursement to the

said City of Cincinnati, of the interest upon the same, which shall have been paid by said City, and for the further purpose of securing said City against all loss or losses, which the same may suffer, whether by payment of said principal or interest, or any damages arising therefrom, and that the above described liens, mortgages or other securities shall have priority or precedence of all claims or obligations, subsequently contracted by such company or companies, and over other liens, securities or mortgages, which were not duly entered into, between said company or companies and other persons or parties, before the respective issues and loans aforesaid."

September 20, 1850, the City Council of the City of Cincinnati passed resolutions, to be found, with the accompanying preamble, on pages 167, 168, and 169, of the printed record in this case, submitting among other things, to a vote of the people, whether a loan of six hundred thousand dollars, in the bonds of the city, should be made to the Ohio and Mississippi Railroad Company, a company within the provisions of the act of the General Assembly referred to, to be "secured by a mortgage upon such property of the Company as the City Council shall require." This resolution also provides that the bonds shall be issued and loaned, among other things, when the companies (which I construe to mean the railroad companies, other than the Ohio and Mississippi Railroad Company, named in the resolutions.) have "given to the City Council good and satisfactory security by mortgage upon said roads, for the prompt payment of said loans."

August 29, 1851, the people of the city having voted in favor of making the loan, and the Company having given notice of its acceptance, the City Council passed an ordinance, to be found on pages 170 and 171, of the Record in this case, for the issue and delivery to the Ohio and Mississippi Railroad Company, of the bonds to the amount of six hundred thousand dollars, agreed upon, reciting in the pre-

amble, that the loan was to be secured by a mortgage upon the Company's road.

December 29, 1851, the City Council passed another ordinance to be found on pages 171, and 172, of the record in this case, repealing so much of the former ordinance, as required the loan to be secured by a mortgage upon the road; but providing that before the issue of any of the bonds by the City, the Company should pledge to the City one million of dollars of its capital stock, as security, in lieu of the mortgage. And on the same day the City Council passed two resolutions, which immediately follow the ordinance in the record, prescribing the terms and conditions, upon which the bonds should be delivered.

April 7, 1852, the City Council passed a resolution accepting the certificate of stock for one million of dollars, which the Railroad Company had delivered and pledged to the City, and directing it to be deposited with the City Treasurer. *Record, page* 173.

June 10, 1852, the Ohio and Mississippi Railroad Company issued its bonds to the amount of two millions and fifty thousand dollars, payable to bearer, and secured their payment by a mortgage of its road and appendages to M. O. Roberts, J. J. Phelps and H. A. Coit, as trustees. *See Bill, and Answer of City; Record, pages* 4 *and* 89.

October 5, 1852, the City made its first delivery of bonds, on account of this loan, to the Railroad Company. And the delivery was continued, in instalments, until completed on the 25th day of August, 1853. *Record, pages* 89 *and* 174.

These are all the occurrences referred to by the City of Cincinnati, in its answer, or in any way suggested by the counsel now representing its interest, as conferring upon it a lien on the track and appendages of the Ohio and Mississippi Railroad Company, superior to all other liens. But there is another item of legislation, which will be referred to, because it has been the subject of conversation, although it was not mentioned in the argument before the Circuit Court, and there is no allusion to it in the City's answer.

February 10, 1851, the General Assembly of Ohio passed an "Act to incorporate the Cincinnati Western Railroad Company," to be found in the Local Laws, vol. 49, p. 429; in the 16th section of which it was provided, "that the City of Cincinnati shall not loan her credit, or issue her bonds, to this, *or any other* railroad company, unless the private stockholders mortgage a sufficient amount of real estate, in addition to the road and other effects of said company or companies, as security for the lending of her credit, or issuing of such bonds by said City."

In the progress of this controversy, the claim of the City of Cincinnati has been advocated upon several distinct theories. It has been suggested, that the Ohio and Mississippi Railroad Company was subject to all the provisions of the general railroad law of Ohio, passed February 11, 1848; and that the City acquired a lien, by virtue of the 13th section of that law. It has been claimed, that the act of March 20, 1850, by its terms, gave to the City an indefeasible lien upon the property of the Railroad Company for whatever loans should be made in pursuance of it. It has also been claimed, that if the act failed of itself to accomplish that purpose, the pledge of capital stock by the Company was, in some mysterious way, operative to complete the transaction. Reference has at times been made to the provision, inserted in the act of incorporation of the Cincinnati Western Railroad Company. Again it has been urged, that the acceptance by the Railroad Company of the first proposition made by the City, completed a contract for a mortgage, and created an equitable lien, which has never been released, by any competent authority. And throughout it has been argued, that the holders of the bonds of the Railroad Company, secured by mortgages of its track and appendages, were chargable with notice of all the rights of the City.

The general railroad law of Ohio, passed February 11, 1848, was obviously designed to apply only to a class of companies specifically designated. It was only when *persons were named as corporators, in an act of the General As-*

sembly of Ohio, with authority to construct a railroad, that the body corporate thus created, became entitled to its privileges, or subject to its restrictions; and then only to such an extent, as those privileges or restictions were not "*modified by the special act*," of incorporation. And the Ohio law, passed March 15, 1849, for the purpose of recognizing the Company already organized under the Indiana charter, and because as stated in its preamble, it was "necessary to confer upon said Company power to construct the road, from the line of the State of Indiana to the City of Cincinnati," not only did not name any persons as corporators, but contained explicit enactments, which would have modified the thirteenth section of the general law, had any such modification been necessary.

The Ohio and Mississippi railroad Company, it has been seen, was incorporated by an act of the Legislature of Indiana, for the purpose of constructing a road across that State, and so soon as the necessary authority could be obtained from the States of Ohio and Illinois, extending that road so as to form a continuous line, connecting the Cities of Cincinnati and St. Louis; and the Company was organized under this charter, and only desired authority from the Legislature of Ohio, to construct so much of its road, as is within the territorial limits of the latter State.

It is manifest, from the Ohio law of 1849, without reference to the subsequent law of January 24, 1851, which in unmistakable words adopts this construction, that it was never the intention of the General Assembly of the State of Ohio, to create a new body corporate, but only to confer power, as under the then existing Constitution of the State it could do by a special act, upon a corporation already existing. And the general railroad law of 1848, except so far as re-enacted, would be inapplicable to a foreign company, thus recognized and empowered, because such a company was embraced neither within its language, nor its obvious intention.

If, however, the Ohio law of March 15, 1849, had been passed, with reference to a body corporate, created by a special act of the Legislature of that State, naming the persons to be incorporated, such a company would in no way have been affected by the thirteenth section of the general railroad law. The act of 1849 distinctly provides, "that the corporate powers, granted to said Company by the act of Indiana, incorporating the same, be recognized;" which is equivalent to a re-enactment of the Indiana charter; and one of the powers thus recognized was a general power to borrow money, upon any security which might be deemed expedient, and without any restriction. And such legislation would, in any case, have been a clear modification of the provision of the general law, giving authority to effect loans coupled with any restrictions.

Again, the explicit reference made, in the act of March 15, 1849, to the provisions of the general law, relating to the procurement of rights of way and materials for construction would of itself be sufficient, in accordance with an undisputed principle, to negative the idea, that any other portion of that law was intended to be adopted or to be in any way operative. *Expressio unius exclusio alterius.*

And the thirteenth section of the general railroad law would not if applicable, have given to the City of Cincinnati, a lien upon any property whatever. It does not profess to give any lien or privilege of any sort; but simply provides, that when loans are made under its authority, and security given for them, such transactions should not *injure or impair* the "*value and security of any liens*," already held by the City.

If a company, to which the act of 1848 was applicable, had procured a loan from the City of Cincinnati, on a hypothecation of stock, or upon the personal guaranty of its directors, but had never availed itself of the authority of the thirteenth section, by borrowing any other money, no one, I think, would seriously advocate, in the presence of an intelligent court, that the City had in such case a lien

upon any property of the Company, not specifically pledged to it. And if not, it is difficult to perceive, upon any principle of law or of reason, how such a lien could be created by a subsequent loan by other parties to the Company.

Until it had been made to appear, (which has not been attempted in the present case,) that subsequent loans obtained, and security given, by such a company, had operated to impair the value of the stock or liens, already held by the City, there would be no foundation for a sound argument in favor of the City's claims.

The Act of March 20, 1850, it will be perceived, both authorizes and directs the City Council, to contract with the railroad companies, to which it may make loans, in reference to the character of the security to be given for them; and it expressly enumerates mortgages, transfers or hypothecations of stock, and other liens and securities, real or personal, as those which may be thus agreed upon. And this provision, it is conceded, would be sufficient to vest in the City Council the complete control of the whole subject of the security, but for the subsequent clause of the same section, enacting that the liens, mortgages, or other securities, so received, shall have priority over all obligations subsequently contracted by the companies, and over all other liens, not acquired by other persons, prior to the issue and loan by the City of its bonds; which latter clause, it is asserted, makes the loans of the city, no matter what specific security may have been agreed upon, liens upon all the property of the respective companies, from the dates of the several loans.

The argument, as nearly as I can comprehend it, in support of this proposition, is that without such a construction the latter clause would have no force, inasmuch as a valid lien, actually acquired by the city, would of course, have the priority provided for; and that the section of the law which contains it, must be so construed as to give some effect to all its language. And the construction suggested seems to be such an one, as would make the legislature provide, that

the City Council might elect to take whatever security it should select, real or personal, by pledge of stock, mortgage of specific property, or of any other description, but that the result must be in every event the same.

The mere statement of this argument appears to carry with it its own refutation; and nothing but the eminence of the counsel, by whom it is advanced, seems to entitle it to serious consideration.

If the construction contended for is sought to be established, as it once was, by separating the two clauses having reference to the security, and making that to be agreed upon by the City Council apply only to the principal and interest of the loans, while a *further* security against loss or damage is provided by the law itself, the reply is that such a construction can not be given, without changing both the words and the punctuation of the law; in addition to which there would obviously be no reason why the legislature should make any such subdivision. If such a construction is sustained upon any other theory, it can only be done by rendering the whole provision, as to the discretion vested in the City Council substantially inoperative, in order to rid the subsequent clause of the charge of being useless. And in any event it must be borne in mind, that the clause relied upon does not in terms, nor even by implication, provide, that the claims of the City of Cincinnati shall be liens upon the roads of the companies, nor upon any other specific thing whatever. The law provides that the City Council may stipulate for such security as it pleases; and it then, perhaps unnecessarily, enacts that whatever security it does take shall have priority over all other subsequent claims. It certainly does not provide that any security, by personal endorsement, or by pledge of stock, shall operate as a mortgage upon a railroad. And it would be a very extraordinary judicial interpretation, which would inject such a provision into the act, in order to shield a portion of its language from the charge of having been unnecessarily employed.

We all know that exhibitions of carelessness and haste are of constant occurrence in the legislation of this country; and that it is not an unusual thing, to find in laws unnecessary provisions and useless repetitions. And while the general principle of construction relied upon in this case, may be admitted to be correct when there is a proper occasion for its application, the Court will hardly be disposed, in order to avoid the conclusion, that the General Assembly of Ohio, has enacted, that a lien shall have priority over subsequent liens, to decide that nothing was meant by the expressed provision, vesting the City Council with an absolute discretion; nor that when there was an intention to give a specific lien upon the tracks of railroad companies and their appurtenances, it was not thought necessary to mention, or even to allude to, that species of property.

It may be remarked too, that effect can be given to the clause in question, by construing it strictly, as a limitation rather than as an extention of the general rule applicable to liens. By the ordinary rule liens become operative from the date when obtained: but this law provides that the security received by the City shall have preference only over other liens obtained subsequent to the *actual issue* by the City of its bonds to the Railroad Company.

If the act of March 20, 1850, did not of itself create a lien upon the property of the Railroad Company, I confess myself unable to understand, how such a result could be brought about by a pledge by the Company of capital stock. Stock in a corporation can be transferred by its owner, either absolutely, or by way of hypothecation, subject to the laws governing the corporation; and such a transfer carries with it the proportion of interest in the corporation itself, which the stock transferred bears to the whole capital stock of the company. But how a transfer of stock, whether by an individual or by the corporation itself, can give a lien upon the property of the corporation, or can aid in completing a defective claim upon that property, I have never been able to comprehend.

In the act to incorporate the Cincinnati Western Railroad Company, which was passed prior to the completion of the contract for a loan from the City of Cincinnati to the Ohio and Mississippi Railroad Company, a provision is to be found, which in its terms imposes restrictions upon the City, as to loaning its credit to the Company then incorporated, "or any other railroad company." The 15th section of this act, however, confers upon the City Council of Cincinnati the same power, to contract with the Company incorporated, as to the security to be taken for loans, which was conferred by the 7th section of the act of March 20, 1850, already quoted, making use, in both cases, of precisely the same language. And the restriction relied upon, and which has been quoted, is that the City shall not loan its credit, unless "*the private stock-holders*" shall mortgage a sufficient amount of real-estate, "*in addition to the road and other effects*" of the Company, to secure the repayment of the loan.

If the General Assembly can be supposed to have intended to insert a general provision as to the powers of the City of Cincinnati, in a private act incorporating a railroad company, it is nevertheless palpable, that the only specific security the taking of which is made indispensable is a security to be given by the private stock-holders, and not by the corporation. And any inference, that can legitimately be drawn from the use of the phrase "in addition to the road and other effects" of the company, is insufficient to repeal the distinct provision of the preceding section of the same law, explicitly conferring upon the City Council a complete discretion as to the whole subject of security. This is only another instance of careless legislation. Whoever prepared the law, inserted the words "any other railroad company," by a slip of the pen; and having in his mind the probability, that a mortgage of the road would usually be the security agreed upon in such cases, in the same way made use of the phrase "in addition to the road *and* other effects," instead of "in addition to the road *or* other effects" of the company. The intention was to re-

quire, in the particular instance under consideration, an additional security from private stock-holders, and evidently not to change the general provision, which was at the same time re-enacted.

But whatever may have been the intention, this law does not, any more than the other, undertake to create a lien upon any road. And whatever effect it might have upon the validity of the bonds of the City, to decide that they were issued in defiance of a material provision of the law of the State, the result would surely not be, to give to the City a lien upon property, which the City Council had not selected as its security.

The only remaining theory upon which I understand the pretensions of the City to be pressed, is based upon what is claimed to have been a contract, once entered into between the City Council and the Railroad Company, for a mortgage. In this connection, it has been asserted, that whatever discretion was vested in the City Council was exhausted by the passage of the resolutions of September 20, 1850, submitting the question of loans to the voters of the city; that the acceptance by the Railroad Company of the terms of these resolutions, one of which, it is argued, stipulated for a mortgage of the road as security, completed a contract for a lien upon the road: and that after the vote of the people, and the completion of a contract in pursuance of it, the City Council had no power to change the security.

It is difficult to perceive how the power, explicitly conferred upon the City Council, to decide upon the security to be exacted, could be exhausted before the passage of the ordinance for the issue of the bonds to be loaned. It was made the duty as well as the right of the Council to decide upon this question: and even if there had been submitted to the people the question of making a loan, on the faith of a particular indemnity, the Council would by no means have precluded itself from insisting upon what was deemed a better security, before making the loan. If the question were open, whether the security taken was in fact superior

to the one originally proposed, it would not be difficult to show that it at least was not inferior; since a mortgage upon a merely hypothetical road, would not only be useless until the road was constructed, but would itself be an obstacle in the way of such construction. But that question is not open. And whatever may be the accountability of the members of the Council to the people, if it can be shown that they misused their discretion, yet inasmuch as they collectively acted clearly within the scope of their authority, in eventually taking stock in the place of a mortgage, the validity of that action can not now be disputed.

The properly constituted authorities of a municipal corporation, as well as the managers of any other corporate body, may bind the corporation by acts in contravention of their plain duty, and even in direct violation of law, whenever they have any power to act at all, in the premises.

"Where the directors of a company do acts in violation of their deed, in a matter, *in which they have no authority*, such acts are altogether null and void. But when acts to be done are within the power and duty of the directors and are neglected, and thereby third parties are damaged, neither a court of law nor of equity, will allow the company to take advantage of that neglect." "If a company neglect a form or an obligation, which they could and ought to perform, they can not afterwards raise an objection of that want of form, as against a person, with whom they have been dealing." *Bargate vs. Shortridge*, 31. *Eng. L. & Eq.* 44.

If it were true, however, that the City Council had no power to dispense with the original provisions of its resolutions, and that those resolutions required from this Company a mortgage, and that the City remained entitled, as against the Railroad Company, to the mortgage at one time contemplated; the fact would nevertheless remain, that no mortgage was ever executed, in pursuance of this agreement; and no such claim could be asserted, as against the holders

of mortgages, regularly executed and recorded, in accordance with the provisions of the law.

There is no proof, that the holders of the bonds of the Ohio and Mississippi Railroad Company ever had *actual* notice of any of the matters, which have been the subjects of consideration; and to whatever extent they may be chargable with notice of the acts of the General Assembly, I have never heard it pretended, that they were so to be charged, in reference to the resolutions and proceedings of the City or its representatives.

All the notice, that can be claimed in this case, will be of very little use to the appellant. The act of March 20, 1850, provides only, giving to it the broadest construction, that the claim of the City shall have priority over all liens not created "before the respective issues and loans aforesaid;" and the issue by the Railroad Company of its first mortgage bonds was made on the 10th of June, 1852, while the first delivery by the City of any of its bonds to the Company was made on the ensuing 5th day of October. The passage of the ordinances in reference to this matter did not complete the loan. The delivery of the bonds by the City was subject to the performance of a number of conditions by the Railroad Company, without which the loan would never have been made. And if the bond-holders were chargeable with any notice, it was of the fact, that the City, which had not yet made a loan, would be entitled, in case it should conclude one, to a lien from the date of such completion; while the rights of the bond-holders took effect from the date of their mortgage.

I have presented my views without any opportunity of knowing what will now be claimed by the counsel for the City; who have furnished no brief. But on the whole case, I am glad to be enabled to believe with confidence, that the decision of the Circuit Court must be affirmed. And I am sure, that this Court would experience profound regret, if it found itself compelled to arrive at a different conclusion.

Whatever may be the relations between the City of Cincinnati and the Ohio and Mississippi Railroad Company,—whether it be true, as I think, that the City has, more fully than any other party, been repaid in incidental advantages, for its investment in this enterprise,—one thing at least is certain, that the judicial sanction of the claim now asserted, would be an injury to the credit, not merely of this municipal corporation, but of other cities and of states, and even of the Government of the United States.

The City Council, reciting in a preamble, that cities were benefited by railroad communications, and ought to aid them, passed resolutions, confessedly legal, in favor of making a loan to this Company. After a vote of the people, concurring with this opinion, it passed an ordinance, also, of undisputed validity, to issue its bonds, and lend them to the Company. Afterwards, finding that the farther loans necessary to complete the enterprise, could not be obtained, unless secured by the mortgage of an unencumbered road, the City Council deliberately, publicly, and without any objection on the part of the people, relinquished the City's claim to a mortgage which it had not taken. The Railroad Company thereupon executed bonds, secured by what appeared to be the first lien upon its road, and appurtenances; and sold them in the market; and commenced to apply the proceeds of this sale to the prosecution of the work for which it was created. And after all this the City made the first issue to the Railroad Company of its bonds.

If under these circumstances, it could be shown, that the City had the right to step in and apply to its own use, to the exclusion of the bond-holders, the proceeds of the work which, but for the money advanced by the latter, would never have been completed, it would be as disgraceful to the law, as the assertion of such a claim is discreditable to the municipal authorities.

THOS. G. MITCHELL,
of Counsel for Appellees.

CINCINNATI, January 8, 1866.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty, N. Y

Supreme Court

OF THE UNITED STATES OF AMERICA.

The City of Cincinnati,
Appellants,

vs.

E. D. Morgan & Company, and George Peabody, Junius S. Morgan, and Charles Gooch, partners, under the name of George Peabody & Co., and others,
Respondents.

Statement and Points on the part of Respondents George Peabody & Co.

The Ohio and Mississippi Railroad Company made a first mortgage upon its railroad property, bearing date May 24, 1852, to Messrs. Roberts, Phelps & Coit, to secure the payment of two thousand and fifty bonds, made and signed by it, bearing the same date, of one thousand dollars each, with coupons or interest warrants attached. Of these coupons, there were outstanding January 1, 1861, $215,145, all the other interest on those bonds to that day having been paid.

On the first day of December, 1852, the company made a second mortgage to Messrs. Mansfield and Hoadley, to secure the payment of fifteen hundred bonds, for one thousand dollars each, made and signed by it, bearing the latter date, each with interest coupons attached.

Subsequently to this, there were two other mortgages made by the company to secure further issues of bonds.

The respondents E. D. Morgan & Co. being the owners of seventy-two of the latter bonds, and there being outstanding altogether two hundred and fifty-eight, with interest on them unpaid, (amounting to $99,339, August, 1861), in January, 1860, they filed their bill in Chancery in the Circuit Court for the Southern District of Ohio, on the part of themselves and such other persons interested with them as might come in and contribute, &c., for the purpose of foreclosing the second mortgage, having a sale of the property, and determining the rights of the parties interested under the several liens. (Bill, pp. 2 to 6, and decree, pp. 75, 77, 78.)

The claim of the appellant was as follows: By an act of the Legislature of Ohio, passed March 20, 1850, the city of Cincinnati was authorized, by a vote of its qualified voters, to loan the credit of the city, by the issue of its bonds, to the railroad companies terminating in the city, to an amount not exceeding one million dollars, upon mortgage, transfer, or hypothecation of the stocks of the companies; and it was provided that the liens, morgages, or other securities received upon such loan, "should have priority or precedence of all claims or obligations subsequently contracted by such company or companies, and over other liens, securities, or mortgages, which were not duly entered into between said company or companies and other persons or parties *before the respective issues or loans aforesaid.*" (Answer of city of Cincinnati, p. 88.)

An arrangement was perfected April 5, 1852, between the city of Cincinnati and the Ohio and Mississippi Railroad Company to make a loan to it of bonds to the amount of $600,000 upon an hypothecation of twenty thousand shares of its stock, valued at $50 each, making one million dollars. On this hypothecation having been made, the city issued to the company its bonds as follows:

October 5, 1852	$100,000
December 7, 1852	100,000
March 2, 1853	100,000
June 4, 1853	100,000

June 21, 1853.....	100,000
August 25, 1853.....	100,000

The city claimed that the debt of the company for those bonds constituted the first lien on the company's railroad. (Answer of the city, p. 89.)

The claim of the respondents George Peabody & Co. is for coupons upon the first mortgage bonds, purchased by them at the request of the Ohio and Mississippi Railroad Company, for $68,145, and held on the security of the said mortgage. (Answer of G. Peabody & Co., pp. 120 to 127.)

The first decree made in the suit was made before the appearance of George Peabody & Co., or the City of Cincinnati, and directed the sale of the property of the company under the second mortgage, subject (1) to the payment of the first mortgage bonds outstanding to $2,050,000, and the payment of the interest thereon; (2) the sale to be for not less than $1,000,000.

And from the moneys received, it was directed: (1) that the expenses of the foreclosure be paid; (2) that certain moneys due to William H. Aspinwall, for use of stock to operate the road, be paid; (3) certain moneys for which the receiver, who had operated the road, was indebted be paid; (4) the payment of $215,145, interest on the first mortgage bonds due prior to and on the first day of January, 1861, and the interest on the first mortgage bonds payable 1st July, 1861; (5) the payment of interest due on the second mortgage bonds; (6) the residue to be held to be disbursed under the direction of the Court. (pp. 80, 81.)

After this decree was made, it was opened on petition of George Peabody & Co., and they were permitted to appear in the suit, and answer, setting up their claim. The petition is on page 105, and the order opening the decree, at p. 115. Their answer is at p. 118. The testimony taken thereupon is at p. 140 *et seq.*

It was also opened on petition of the City of Cincinnati, and it was permitted to appear and put in its answer.

On the 25th October, 1862, the supplemental decree upon the answer of George Peabody & Co. was made, at p. 165, by which it was found and decreed that the coupons purchased and redeemed by them were in pursuance of the agreement for the purpose, made July 3, 1855, and that

George Peabody & Co. were entitled to assert the same as liens under the first mortgage, in the same manner as they stood in point of priority at the time they were so purchased by them, and that there was due upon them for principal and interest to January 1, 1861, $94,280 82, with interest from that date, at seven per cent. per annum, which the Court directed to be paid from the first proceeds of the sale.

The Court also decreed that the City of Cincinnati had no lien on the property of the company other than the stock hypothecated to it upon its loan of its bonds (p. 167).

From this decree the City of Cincinnati brings its appeal.

The ordinance of the city, under which the advance of its bonds was made, is given at pp. 171, 172, and bears date December 29, 1851. The certificate of stock, at p. 173, and the memorandum of the issue of the bonds, at p. 174. It will be seen that the form the transaction assumed was—

A loan by the city to the company of $600,000 on the hypothecation of its stock to the amount of $1,000,000, with a power in the city to sell it in its pleasure, and an agreement of the company to furnish more stock, if necessary, to pay the interest to become payable on the city bonds.

The decree of the Court below, at page 167, that the city had no lien, excepting upon the stock so hypothecated, and refusing to modify the original decree in respect to the claims of the city, is the only one appealed from, and the only matter in controversy here.

Points on the part of George Peabody & Co.

I.—The contract between the City of Cincinnati and the Ohio and Mississippi Railroad Company was, that the city should loan its bonds to the company on the hypothecation to the city of one million dollars of its stock, with power to sell it in such sums and upon such terms as the city might direct.

It did not contemplate a lien upon any property of the company, but a pledge of a portion of its stock, with power to sell it. The remaining portions of the capital stock were not affected by any lien.

II.—The city had power to make this contract.

Act of March 15, 1849, Laws Ohio, v. 47, p. 172. "To aid the Ohio and Mississippi Railroad Company," § 3.

Act of March 20, 1859, Laws Ohio. "To authorize the city of Cincinnati to loan its credit to railroad companies."

Act of January 24, 1851, vol. 49 Laws Ohio, p. 456.

III.—The appeal having been taken only by the city of Cincinnati, and it having no lien upon the property of the Ohio and Mississippi Railroad Company sought to be foreclosed, no further examination of the decree is before the Court for adjudication, and the appeal should be dismissed, and the decree affirmed.

William Tracy,
Of Counsel for G. Peabody & Co.